MICHAEL G. YODER (S.B. #83059)
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610 Newport Center Drive, 17th Floor
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Attorneys for Defendant
QUIKSILVER, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON D. BLEHM, dba FDC Investments, Inc.,

Plaintiff,

v.

BETSY MCINTYRE and QUIKSILVER, INC.,

Defendants.

Case No. 08CV1358 BTM NLS

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF QUIKSILVER INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR, IN THE ALTERNATIVE, MOTION TO STAY ACTION PENDING RESOLUTION OF PRIOR STATE COURT ACTION

Date: October 17, 2008
Time: 11:00 a.m.

Judge: Hon. Barry Ted Moskowitz
Courtroom: 15

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Federal Rule of Evidence 201, Defendant Quiksilver, Inc. hereby requests that the Court take judicial notice of the following materials in support of its Motion to Dismiss Plaintiff's Complaint or, in the Alternative, Motion to Stay Action Pending Resolution of Prior State Court Action. *See* Fed. R. Evid. § 201 (the Court "shall take judicial notice [of adjudicative facts] if requested by a party and supplied with the necessary information").

Each of the materials set forth herein (unless specifically noted otherwise) constitutes a court filing in another related action. "Materials from a proceeding in another tribunal are appropriate for judicial notice." *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 207 n.5 (9th Cir.1995), rev'd on other grounds, 520 U.S. 548 (1997) (taking judicial notice of a decision and order of an Administrative Law Judge); *see also Meredith v. Oregon*, 321 F.3d 807, 817 n.10 (9th Cir. 2003) (taking judicial notice of filings in Oregon Court of Appeals); *Intri-Plex Technologies, Inc.*, 499 F.3d at 1052 (taking judicial notice of filings in related action on motion to dismiss).

1. The Complaint filed on or about October 1, 2002 in the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. GIN024468). A true and correct copy of the Complaint is attached hereto as Exhibit 1.

2. The Second Amended Cross-Complaint filed on or about June 23, 2003 in the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. GIN024468). A true and correct copy of the Second Amended Cross-Complaint is attached hereto as Exhibit 2.

3. The Settlement Agreement and Release dated August 20, 2003, which was filed as Exhibit A to the Complaint filed on or about August 17, 2006 in the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* The Court may take judicial notice of the Settlement Agreement for the reasons set forth above, as well as on the ground that the contents of the Settlement Agreement are alleged in the Complaint. *See Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994) ("documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss."). A true and correct copy of the Settlement Agreement is attached hereto as Exhibit 3 (a copy is also attached to Blehm's State Court Complaint (Exhibit 8 to this

Request) as it was filed with the Court on or about August 17, 2006).

4. The Statement of Decision entered on or about September 30, 2003 by the United States Tax Court in *DC Shoes. Inc. v. Commissioner of Internal Revenue* (Docket No. 11574-02). A true and correct copy of the Decision is attached hereto as Exhibit 4.

5. Internal Revenue Code Section 3509. A true and correct copy of the text of Internal Revenue Code Section 3509 is attached hereto as Exhibit 5. Although a copy of the statute is included herewith for ease of reference, the Court need not take judicial notice of statutes of the United States.

6. The Complaint filed on or about July 14, 2005 in the United States District Court for Southern District of California, in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. 05CV1418 JAH (WMc)). A true and correct copy of the Complaint is attached hereto as Exhibit 6.

7. The Order Granting Defendants' Motion to Dismiss, entered on or about February 24, 2006, by the United States District Court for the Southern District of California in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et. al.* (Case No. 05CV1418 JAH (WMc)). A true and correct copy of the Court's Order is attached hereto as Exhibit 7.

8. The Complaint filed on or about August 17, 2006 in the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. GIN054897). A true and correct copy of the Complaint is attached hereto as Exhibit 8.

9. The Judgment After Jury Trial, entered on or about January 4, 2008, by the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. GIN054897). A true and correct copy of the Judgment After Jury Trial is attached hereto as Exhibit 9.

10. The Civil Case Information Statement filed on or about July 14, 2008 in the California Court of Appeal in the appeal of *Clayton D. Blehm, et al. v. DC*

Shoes, Inc., et al. (Appeal Case No. D053399). A true and correct copy of the Civil Case Information Statement is attached hereto as Exhibit 10.

11. The Memorandum of Points and Authorities in Support of Motion for New Trial filed on or about July 15, 2008 in the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. GIN054897). A true and correct copy of the Memorandum is attached hereto as Exhibit 11.

12. The Notice of Appeal filed on or about July 2, 2008 in the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. GIN054897). A true and correct copy of the Notice of Appeal is attached hereto as Exhibit 12.

13. The Motion to Strike Plaintiff's Untimely Filed Motion for New Trial filed on or about August 1, 2008 in the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. GIN054897). A true and correct copy of the Motion to Strike is attached hereto as Exhibit 13.

14. The Opposition to Plaintiff's Motion for New Trial filed on or about August 1, 2008 in the Superior Court for the County of San Diego in *Clayton D. Blehm, et al. v. DC Shoes, Inc., et al.* (Case No. GIN054897). A true and correct copy of the Opposition to Plaintiffs' Motion for New Trial is attached hereto as Exhibit 14.

Dated: August 4, 2008

MICHAEL G. YODER
MOLLY J. MAGNUSON
O'MELVENY & MYERS LLP

By: [signature]
Molly J. Magnuson
Attorneys for Defendant
QUIKSILVER, INC.

PROOF OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 610 Newport Center Drive, 17th Floor, Newport Beach, California 92660-6429. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence collected from me would be processed on the same day, with postage thereon fully prepaid and placed for deposit that day with the United States Postal Service. On August 4, 2008 I served the following:

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF QUIKSILVER INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR, IN THE ALTERNATIVE, MOTION TO STAY ACTION PENDING RESOLUTION OF PRIOR STATE COURT ACTION

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

Lauren Castaldi
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044

Roy R. Withers, Esq.
Law Office of Roy R. Withers
2802 Juan Street, Suite 12
San Diego, CA 92110

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 4, 2008, at Newport Beach, California.

[signature]
Adonna Payne

MICHAEL G. YODER (S.B. #83059)
MOLLY J. MAGNUSON (S.B. #229444)
O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Floor
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Telephone: (949) 760-9600
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Attorneys for Defendant
QUIKSILVER, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON D. BLEHM, dba FDC Investments, Inc., Plaintiff, v. BETSY MCINTYRE and QUIKSILVER, INC., Defendants.	Case No. 08CV1358 BTM NLS **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF QUIKSILVER INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR, IN THE ALTERNATIVE, MOTION TO STAY ACTION PENDING RESOLUTION OF PRIOR STATE COURT ACTION** Date: October 17, 2008 Time: 11:00 a.m. Judge: Hon. Barry Ted Moskowitz Courtroom: 15

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Each of the materials set forth herein (unless specifically noted otherwise) constitutes a court filing in another related action. "Materials from a proceeding in another tribunal are appropriate for judicial notice." *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 207 n.5 (9th Cir.1995), rev'd on other grounds, 520 U.S. 548 (1997) (taking judicial notice of a decision and order of an Administrative Law Judge); *see also Meredith v. Oregon*, 321 F.3d 807, 817 n.10 (9th Cir. 2003) (taking judicial notice of filings in Oregon Court of Appeals); *Intri-Plex Technologies, Inc.*, 499 F.3d at 1052 (taking judicial notice of filings in related action on motion to dismiss).

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Dated: August 4, 2008

MICHAEL G. YODER
MOLLY J. MAGNUSON
O'MELVENY & MYERS LLP

By: [signature]
Molly J. Magnuson
Attorneys for Defendant
QUIKSILVER, INC.

PROOF OF SERVICE BY MAIL

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by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

Lauren Castaldi
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044

Roy R. Withers, Esq.
Law Office of Roy R. Withers
2802 Juan Street, Suite 12
San Diego, CA 92110

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 4, 2008, at Newport Beach, California.

[signature]
Adonna Payne

Exhibit 1

9E/1997/5405

Michael T. McColloch, Esq. (66766)
Lawrence G. Campitiello, Esq. (110274)
McColloch & Campitiello, LLP
5900 La Place Court, Suite 100
Carlsbad, CA 92008
(760) 804-0153

Attorneys for Plaintiffs
CLAYTON D. BLEHM,
CLAYTON BLEHM LIVING TRUST 1997,
and FDC INVESTMENTS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation; Plaintiffs, vs. DC SHOES, INC., a California corporation; BILLABONG INTERNATIONAL LIMITED, a corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; and DOES 1 through 25, inclusive, Defendants.	Case No. GIN024468 COMPLAINT FOR TORTIOUS DISCHARGE IN VIOLATION OF PUBLIC POLICY, BREACH OF IMPLIED CONTRACT, BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING, INTERFERENCE WITH CONTRACTUAL RELATIONS, AND BREACH OF CONTRACT

Plaintiffs, CLAYTON D. BLEHM ("Blehm"), CLAYTON BLEHM LIVING TRUST 1997 ("Blehm Trust"), and FDC INVESTMENTS, INC. ("FDC") allege:

FIRST CAUSE OF ACTION

[Tortious Discharge In Violation Of Public Policy Brought By Blehm Against DC]

1. Blehm is, and at all times mentioned herein was, an individual, born November 3, 1932, residing and conducting business in North San Diego County, California.

Court's Ex. C09-1
Case # GIN054887
Rec'd
Dept.

EXHIBIT 4
TRACK
DATE 6/26/07
WITNESS: Kintz
PAGE(S) 17
LAURA TAYLOR MARTIN CSR NO. 4158

2. Blehm Trust is, and at all times mentioned herein was, a living trust created under the laws of the State of California. Blehm is, and at all times mentioned herein was, a trustee of Blehm Trust.

3. FDC is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in North San Diego County, California. Blehm is, and at all times mentioned herein was, the chief executive officer and sole shareholder of FDC.

4. Defendant DC SHOES, INC. ("DC") is, and at all times mentioned herein was, a corporation organized and existing under the laws of the State of California with its principal place of business located in North San Diego County, California. At all times mentioned herein, DC was in the business of designing, manufacturing, and selling sports footwear, apparel, and related goods.

5. Plaintiffs are informed and believe, and based upon their information and belief allege, that defendant BILLABONG INTERNATIONAL LIMITED ("Billabong") is, and at all times mentioned herein was, a corporation organized and existing under the laws of New South Wales, Australia, conducting business in North San Diego County, California. Plaintiffs are informed and believe, and based upon their information and belief allege, that at all times mentioned herein, Billabong was in the business of designing, manufacturing, and selling sports apparel and related goods.

6. Defendant KENNETH BLOCK ("Block") is, and at all times mentioned herein was, an individual, born November 12, 1967, residing and working in North San Diego County, California.

7. Defendant DAMON WAY ("Way") is, and at all times mentioned herein was, an individual, born September 23, 1971, residing and working in North San Diego County, California.

8. Plaintiffs are informed and believe, and based upon their information and belief allege, that defendant THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 ("Way Trust") is, and at all times mentioned herein was, a living trust created under the

laws of the State of California. Plaintiffs are informed and believe, and based upon their information and belief allege, that at all times mentioned, Way was a trustee of Way Trust.

9. Plaintiffs are informed and believe, and based upon their information and belief allege, that defendant DC SHOES EMPLOYEE SHARE TRUST ("DC Trust") is, and at all times mentioned herein was, an employee share trust created under the laws of the State of California and the laws of the United States. Plaintiffs are informed and believe, and based upon their information and belief allege, that at all times mentioned herein, Blehm, Block, and Way were trustees of DC Trust.

10. The events giving rise to this action occurred in North San Diego County, California. The causes of action set forth herein are money demands in excess of the jurisdictional minimum of this court.

11. The true names and capacities of defendants sued herein as Does 1-25, inclusive, are unknown to plaintiffs, and plaintiffs therefore sue those defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. Plaintiffs are informed and believe and thereon allege that each of the fictitiously named defendants is responsible for the injuries suffered by plaintiffs as hereinafter alleged.

12. Plaintiffs are informed and believe, and based upon their information and belief allege, that at all times mentioned herein each of the defendants was the agent and employee of each of the remaining defendants and, in doing the things hereinafter alleged, was acting within the scope of such agency and employment.

13. Commencing on or about January 1, 1993, Blehm was hired by Circus Distribution, predecessor to DC, to perform the duties of Controller. At that time, Circus Distribution was a partnership owned by Block and Way. In or about October 1993, Blehm formed Circus Distribution, Inc. ("Circus"), which was also owned by Block and Way. As of January 1, 1994, the business began operating under the corporate structure. During the period January 1, 1994 to December 31, 1995, Blehm performed his duties as Controller pursuant to an exclusive annually renewable written full time consulting agreement between Circus and Blehm's company, FDC. During the time Blehm was Controller to the partnership and the

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corporation, Blehm performed his duties competently and professionally.

14. Effective as of December 31, 1995, as part of his compensation, Blehm was issued shares of stock in Circus sufficient to make him a one-third owner of the company, along with Block and Way. At the November 19, 1996 annual shareholder meeting, Blehm was elected to Circus' Board of Directors. At the November 19, 1996 Directors' meeting Blehm was appointed as a corporate officer of Circus, i.e., its Chief Financial Officer ("CFO"). Further at the November 19, 1996 annual Directors' meeting, Blehm, along with other directors, personally guaranteed a line of credit starting at $750,000 and increasing to $12 million obtained for Circus from Merrill Lynch Business Financial Services, Inc. Effective as of November 17, 1998, Circus Distribution, Inc. changed its name to DC. During the time Blehm was CFO of Circus/DC, Blehm performed his duties competently and professionally, without criticism from others in senior management of Circus/DC.

15. On or about January 1, 2002, Blehm formally became an employee of DC. Thereafter, Blehm continued to perform his duties as CFO in a competent and professional manner. Between 1995 and the present, gross sales of DC increased from approximately $8 million annually to approximately $110 million annually.

16. On or about April 4, 2002, in an unsolicited inquiry, Billabong expressed interest in purchasing all the issued and outstanding corporate shares of DC. Blehm is informed and believes, and based upon his information and belief alleges, that Billabong's interest in acquiring DC's stock was subject to various conditions, one of which was that DC terminate Blehm, because he was an older, high salaried employee. Blehm is informed and believes, and based upon his information and belief alleges, that Billabong wanted DC to terminate Blehm as a condition to Billabong acquiring DC's stock, because Billabong did not think Blehm fit its corporate image, i.e., that of marketing sports apparel to predominately young consumers.

17. DC terminated Blehm's employment on June 30, 2002. Although DC tried to justify Blehm's termination on another pretext, Blehm is informed and believes, and based upon his information and belief alleges, that Blehm was terminated because of his age. Blehm was 69 years old at the time of his termination. Blehm is informed and believes, and based upon his

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information and belief alleges, that subsequent to his termination, Blehm's duties as CFO of DC were assumed by a substantially younger, less qualified individual.

18. DC's actions in terminating Blehm on account of his age violate the public policy expressed in the California Fair Employment and Housing Act (Government Code §12900 et. seq.) prohibiting employment discrimination based on age.

19. As a proximate result of DC's conduct, Blehm has suffered harm, including lost earnings and other employment benefits, humiliation, embarrassment, mental anguish and lost personal and professional relationships, all to his damage in an amount to be established at trial, but believed to be in excess of $10 million.

20. Blehm is informed and believes, and based upon his information and belief alleges, that DC terminated his employment with the intention of depriving Blehm of property and legal rights causing injury, and was despicable conduct that subjected Blehm to cruel and unjust hardship in conscious disregard of Blehm's rights, so as to justify an award of exemplary and punitive damages, in an amount to be established at trial.

21. Additionally, Blehm is entitled to recovery of his reasonable attorneys fees pursuant to applicable anti-discrimination statutes.

SECOND CAUSE OF ACTION
[Breach Of Implied Contract Brought By Blehm Against DC]

22. Plaintiffs incorporate by reference paragraphs 1 through 18, inclusive, of their First Cause of Action, as though the same were fully set forth here.

23. Blehm was the Controller and/or CFO of DC and its predecessors for more than nine years. During that time, he became one-third owner of the company, was elected to DC's Board of Directors, and was appointed a corporate officer. Blehm also personally guaranteed substantial long-term obligations of DC. During his tenure as Controller and/or CFO of DC, Blehm performed his duties in a competent and professional manner and was compensated handsomely. He consistently received excellent performance evaluations, and merit raises and bonuses. Blehm was lead to reasonably believe that he would not be terminated arbitrarily, and relied on the fact that, unlike other employees, Blehm was not required by DC to acknowledge

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acceptance of the "at will" employment provisions contained in DC's Employee Handbook.

24. Those facts, and others, created an implied employment contract between Blehm and DC, whereby DC agreed to employ Blehm as long as he chose to work, and whereby DC agreed not to discharge Blehm absent just cause.

25. At all times relevant, Blehm has fulfilled his duties under the implied employment contract and has been ready, willing, and able to continue performing his duties in a competent and professional manner.

26. On June 30, 2002, DC breached the implied contract by terminating Blehm's employment without notice, opportunity to defend or correct the purported performances issues, or just cause. DC attempted to justify its termination of Blehm's employment based on allegedly poor performance, however, Blehm had received consistently good performance evaluations and had received consistent raises, bonuses, and commendations only months before his termination.

27. As a proximate result of DC's breach of the employment contract, Blehm has suffered and continues to suffer losses in earnings and other employment benefits, to his damage in an amount to be established at trial, but believed to be in excess of $10 million.

THIRD CAUSE OF ACTION

[Breach Of Implied Covenant Of Good Faith And Fair Dealing Brought By Blehm Against DC]

28. Plaintiffs incorporate by reference paragraphs 1 through 27, inclusive, of their complaint, as though the same were fully set forth here.

29. The employment agreement referred to above contained an implied covenant of good faith and fair dealing, which obligated DC to perform the terms and conditions of the agreement fairly and in good faith and to refrain from doing any act that would prevent or impede Blehm from performing any of the conditions of the contract that he agreed to perform, or any act that would deprive Blehm of the benefits of the contract.

30. Blehm performed all the duties and conditions of the employment agreement.

31. DC breached the implied covenant of good faith and fair dealing under the employment agreement by discharging Blehm without notice or just cause. In fact, DC

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terminated Blehm's employment, not because of alleged poor performance, but because of his age. DC further breached the implied covenant of good faith and fair dealing by violating and failing to follow its own policies with regard to providing warnings of performance deficiencies before discharge.

32. Blehm is informed and believes, and based upon his information and belief alleges, that DC further breached the implied covenant of good faith and fair dealing under the employment agreement, and terminated Blehm without just cause, because DC was acting to satisfy the selfish wishes of Billabong. On or about April 18, 2002, Billabong began negotiating with DC for the purchase of all the issued and outstanding shares of corporate stock of DC. Ultimately, on or about June 4, 2002, Billabong executed a binding Letter of Intent with DC which provided, among other things, that Billabong would make an initial cash "down payment" to the shareholders of DC, and pay the balance of the share purchase price in installments over a specified time. Pursuant to the binding Letter of Intent, the "pay out" portion of the purchase price was tied to DC's profitability over the specified pay out period. Blehm is informed and believes, and upon his information and belief alleges, that shortly after June 4, 2002, Billabong instructed DC to fire Blehm. Blehm is also informed and believes, and based upon his information and belief alleges, that Billabong wanted DC to fire Blehm because of Blehm's age. Blehm is informed and believes, and based upon his information and belief alleges, that Billabong wanted DC to replace Blehm with a younger, lower salaried employee, because DC would be a more attractive takeover target for Billabong with lowered overhead, and because Billabong did not think Blehm fit its corporate image, i.e., that of marketing sports apparel to predominately young consumers.

33. Blehm is further informed and believes, and based upon his information and belief alleges, that Billabong also wanted DC to fire Blehm because Blehm was insisting Billabong institute certain safeguards to maximize the "pay out" portion of the stock purchase price for DC's shareholders. Blehm is informed and believes, and based upon his information and belief alleges, that Billabong wanted Blehm out of the way so it could take advantage of DC's shareholders, i.e., manipulate the profitability of DC so as to minimize the "pay out"

portion of the stock purchase price.

34. As a proximate result of DC's breach of the implied covenant of good faith and fair dealing under the employment contract, Blehm has suffered and continues to suffer losses in earnings and other employment benefits, to his damage in an amount to be established at trial, but believed to be in excess of $10 million. As a further proximate result of DC's breach of the implied covenant of good faith and fair dealing under the employment contract, Blehm has incurred reasonable attorney's fees in attempting to secure the benefits owed him under the employment contract.

FOURTH CAUSE OF ACTION

[Interference With Contractual Relations Brought By Blehm Against Billabong]

35. Plaintiffs incorporate by reference paragraphs 1 through 34, inclusive, of their complaint, as though the same were fully set forth here.

36. On or about April 18, 2002, Billabong began negotiating with DC for the purchase of all the issued and outstanding shares of corporate stock of DC. Ultimately, on or about June 4, 2002, Billabong executed a binding Letter of Intent with DC which provided, among other things, that Billabong would make an initial cash "down payment" to the shareholders of DC, and pay the balance of the share purchase price in installments over a specified time. Pursuant to the binding Letter of Intent, the "pay out" portion of the purchase price was tied to DC's profitability over the specified pay out period.

37. Blehm is informed and believes, and based upon his information and belief alleges, that at the time Billabong provided DC with the binding Letter of Intent, on or about June 4, 2002, Billabong knew of the existence of the employment agreement between Blehm and DC.

38. Blehm is informed and believes, and based upon his information and belief alleges, that on or about June 4, 2002, Billabong engaged in a course of conduct designed to deprive Blehm of his rights under the employment agreement. Blehm is informed and believes, and upon his information and belief alleges, that shortly after June 4, 2002, Billabong instructed DC to fire Blehm. Blehm is also informed and believes, and based upon his

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information and belief alleges, that Billabong wanted DC to fire Blehm because of Blehm's age. Blehm is informed and believes, and based upon his information and belief alleges, that Billabong wanted DC to replace Blehm with a younger, lower salaried employee, because DC would be a more attractive takeover target for Billabong with lowered overhead, and because Billabong did not think Blehm fit its corporate image, i.e., that of marketing sports apparel to predominately young consumers.

39. Blehm is further informed and believes, and based upon his information and belief alleges, that Billabong also wanted DC to fire Blehm because Blehm was insisting Billabong institute certain safeguards to maximize the "pay out" portion of the stock purchase price for DC's shareholders. Blehm is informed and believes, and based upon his information and belief alleges, that Billabong wanted Blehm out of the way so it could take advantage of DC's shareholders, i.e., manipulate the profitability of DC so as to minimize the "pay out" portion of the stock purchase price.

40. Blehm is informed and believes, and based upon his information and belief alleges, that the conduct of Billabong as alleged herein was unjustified, and done with the intent of depriving Blehm of the benefits of his employment agreement with DC.

41. Blehm is informed and believes, and based upon his information and belief alleges, that as a proximate result of the conduct of Billabong, Blehm has been damaged in an amount in excess of $10 million, to be established at trial.

42. Blehm is informed and believes, and based upon his information and belief alleges, that Billabong's actions were intended to deprive Blehm of property and legal rights causing injury, and was despicable conduct that subjected Blehm to cruel and unjust hardship in conscious disregard of Blehm's rights, so as to justify an award of exemplary and punitive damages.

FIFTH CAUSE OF ACTION
[Breach of Contract Brought By Blehm Against Block and Way]

43. Plaintiffs incorporate by reference paragraphs 1 through 42, inclusive, of their complaint, as though the same were fully set forth here.

44. Blehm and defendants Block and Way repeatedly agreed, both orally and in writing, that each would be compensated equally for their respective services to DC.

45. Blehm and Defendants Block and Way were in fact compensated equally for their respective services to DC from 1995 to 2002.

46. Defendants Block and Way breached the agreement when on June 30, 2002 they, acting in concert, wrongfully and without notice and just cause terminated Blehm's employment by DC and terminated future compensation to Blehm.

47. Blehm is informed and believes, and thereon alleges, that defendants Block and Way have continued compensating themselves equally after terminating Blehm.

48. As a proximate result of the breach of contract by defendants Block and Way, Blehm has suffered and continues to suffer losses in earnings and other employment benefits, to his damage in an amount to be established at trial, but believed to be in excess of $10 million

SIXTH CAUSE OF ACTION

[Breach of Contract Brought By Blehm, Blehm Trust, and FDC Against Billabong]

49. Plaintiffs incorporate by reference paragraphs 1 through 48, inclusive, of their complaint, as though the same were fully set forth here.

50. On or about March 27, 2002, in an unsolicited written e-mail, Billabong expressed interest in acquiring DC. In its e-mail correspondence, Billabong represented that its acquisition of DC would have "some key components." Among other things, in its e-mail correspondence Billabong represented that if Billabong acquired DC, at DC there would be:

- no staffing changes;
- key management would need to sign on for 3+years in the same roles as they currently fill;
- the owners would need to be just as involved afterwards - to keep the company's soul and strategies moving; and
- significant incentives for the owners and key staff to continue to deliver growth and results for 3 years.

51. Commencing in the month of April 2002, discussions began between

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representatives of Billabong and representatives of DC concerning the possible acquisition of DC by Billabong. During the months of April and May 2002, representatives of Billabong visited DC's facilities, reviewed DC's operations, inspected DC's books and records, viewed DC's production sites in Korea and China, and performed various other due diligence in anticipation of acquiring DC. In connection with those discussions and other activities, Matthew Perrin ("Perrin"), Billabong's CEO, acted as the primary spokesperson on behalf of Billabong. Similarly, in connection with those discussions and other activities, Blehm acted as the primary spokesperson on behalf of DC.

52. On June 4, 2002, a written agreement concerning Billabong's acquisition of DC was entered into between Billabong, as buyer, and Blehm Trust, Way Trust, Block, DC Trust, and FDC, as sellers (collectively referred to as "Sellers"). A true and correct copy of the agreement is attached hereto, marked Exhibit "A," and incorporated herein by reference (hereinafter referred to as the "Stock Purchase Agreement").

REDACTED

Pursuant to the Stock Purchase Agreement, the parties expressly intended that the closing of the transaction would occur on or about July 1, 2002, or as soon thereafter as practicable ("the Closing Date"). REDACTED

The terms of the Stock Purchase Agreement also provided that Billabong would deliver an additional $3 million on the Closing Date to a mutually acceptable escrow agent to be held for a period of twelve months as security for potential tax liabilities of DC and FDC.

53. The terms of the Stock Purchase Agreement further provided that the balance of the purchase price, together with value enhancement bonuses, would be paid in specified annual installments over a period of three and one-half (3 ½) years following the Closing Date. Pursuant to the Stock Purchase Agreement, the amount of each subsequent annual installment was dependent on the profitability of DC during the "payout" period, and was expressly tied to DC's achievement of specified profit goals. REDACTED

REDACTED

54. On or about June 19, 2002, Blehm confirmed with Perrin, both orally and in writing, Billabong's prior representation that DC's key personnel, including Blehm, would continue to operate and manage DC for a period of at least two years after the Closing Date. This was critical to Blehm, Blehm Trust, and FDC, since the amount of each annual installment which Billabong was to pay to the Sellers under the Stock Purchase Agreement was expressly tied to the continued profitability of DC after the Closing Date.

55. The Sellers have performed all terms, conditions and covenants on their part to be performed under the Stock Purchase Agreement. Way Trust and DC Trust are included herein so that all necessary parties to the Stock Purchase Agreement are properly joined and before the court.

56. Shortly after June 19, 2002, Billabong breached the Stock Purchase Agreement by demanding that Blehm, Block and Way each execute written "at will" employment agreements. Blehm refused to execute the "at will" employment agreement presented to him by Billabong because, although the employment agreement provided that Blehm, and others, would continue to be employed by DC for a period of at least two years following the Closing Date, the employment agreement also reserved the option for Billabong to terminate the employee "at will." Blehm could thus potentially lose the ability to assure the profitability of DC during the "pay-out" period, as well as the ability to maximize the amount of the annual installments payable to the Sellers under the Stock Purchase Agreement.

57. After June 19, 2002 and before June 30, 2002, Billabong further breached the Stock Purchase Agreement by demanding that DC terminate Blehm's employment as a condition to completion of the Stock Purchase Agreement. On June 30, 2002, DC in fact terminated Blehm's employment at the request of Billabong.

58. On or about July 1, 2002, Billabong further breached the Stock Purchase Agreement REDACTED by failing and refusing to complete the purchase of the outstanding capital

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stock of DC and FDC.

59. As a proximate result of Billabong's breach of the Stock Purchase Agreement, Blehm, Blehm Trust, and FDC have suffered and continue to suffer damages REDACTED As a further proximate result of Billabong's breach of the Stock Purchase Agreement, Blehm, Blehm Trust, and FDC have incurred reasonable attorney's fees in attempting to secure the benefits owed them under the Stock Purchase Agreement.

WHEREFORE, Blehm prays judgment against defendants, and each of them, as follows:

1. For compensatory damages REDACTED

2. For compensatory damages in excess of $10 million to be established at trial on the First through Fifth Causes of Action;

3. For applicable interest;

4. For exemplary and punitive damages on the First and Fourth Causes of Action;

5. For reasonable attorney's fees according to proof at trial;

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem just and proper.

DATED: 10-1-02 MCCOLLOCH & CAMPITIELLO, LLP

By: [signature]
MICHAEL T. McCOLLOCH
Attorneys for plaintiffs
CLAYTON D. BLEHM,
CLAYTON BLEHM LIVING TRUST 1997, and
FDC INVESTMENTS, INC.

June 4, 2002

Matthew Perrin
President
Billabong International Limited

Re: Purchase of Stock of DC Shoes, Inc., and FDC Investments, Inc. by Billabong International Limited

Dear Mr. Perrin

The purpose of this letter (the "Letter") is to set forth the basic binding agreement among Billabong International Limited ("Buyer"), the Clayton Blehm Living Trust 1997, The Damon Way Revocable Trust U/A dated May 20, 1999, Kenneth Block, and the DC Employee Share Trust (collectively, "Sellers") with respect to the acquisition of all of the outstanding capital stock of DC Shoes, Inc., and FDC Investments, Inc. (the "Companies"), which are owned beneficially and of record by Sellers on the terms set forth below.

1. Basic Transaction. Buyer will acquire all of the outstanding capital stock of the Companies, all of which are owned beneficially and of record by Prospective Sellers. The parties intend that the closing of the proposed transaction would occur on or about July 1, 2002, or as soon thereafter as is practicable (the "Closing Date"). The entire transaction will be more fully set forth in Definitive Agreements, substantially in the form of the draft agreement attached hereto (where the draft is in conflict with the terms of this Letter, the terms of this letter will prevail).

2. Purchase Price. The basic purchase price for the Shares would be $130,000,000 of which:

REDACTED

EXHIBIT A

REDACTED

g. On the Closing Date, Buyer will issue options to Sellers to purchase US$5,000,000 worth of Buyer's stock. The strike price of the options will be the price for Buyer's stock on the All Ordinaries Exchange as of the close of business on the day before the Closing Date. One third of said options will become exercisable on the first anniversary of the Closing Date, one third of said options will become exercisable on the second anniversary of the Closing Date, and one third of said options will become exercisable on the third anniversary of the Closing Date. Options will expire one year after they become exercisable if not sooner exercised. If any option holder should voluntarily leave the employ of the Acquired Company (other than because of death or health reasons) prior to the exercise of any options, such unexercised options will automatically expire.

EXHIBIT A

H. The Purchase Price, and each component thereof, would be divided between Sellers pro rata in accordance with their respective ownership of the Shares.

3. Conduct of Business. Until the Definitive Agreement has been duly executed and delivered by all of the parties, Sellers shall cause the Companies to conduct their businesses only in the ordinary course, and not to engage in any extraordinary transactions without Buyer's prior consent, including:

(a) not disposing of any assets of the Company, except in the ordinary course of business;

(b) not issuing any equity securities or options, warrants, rights or convertible securities;

(c) not paying any dividends or redeeming any securities; and

(d) not borrowing any funds, under existing credit lines or otherwise, except as reasonably necessary for the ordinary operation of the Company's business in a manner, and in amounts, in keeping with historical practices.

4. Disclosure. Except as and to the extent required by law, without the prior written consent of the other party, neither Buyer nor Sellers shall, and each shall direct their Representatives not to, directly or indirectly, make any public comment, statement or communications with respect to, or otherwise disclose or permit the disclosure of the existence of discussions regarding, a possible transaction between the parties or any of the terms, conditions or other aspects of the transaction proposed in this Letter.

5. Termination. The agreements embodied in this Letter may be terminated only upon the mutual written consent of the parties. Upon termination of the Letter, the parties shall have no further obligations hereunder, except with respect to the provisions regarding non-disclosure, which shall survive any such termination.

6. Governing Law, Jurisdiction, Venue. This Letter and the Definitive Agreement shall be governed by California law, excluding that body of law relating to conflicts of laws. Any action or proceeding with respect to the matters set forth herein shall be brought in the federal or state courts of the State of California, and both parties agree to jurisdiction and venue in such courts.

EXHIBIT A

/15/2002 12:23 FAX 7258901 DEL MAR SMR&H 005/005

7. Attorneys' Fees. If any legal proceeding is brought to interpret or enforce the terms of this agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs, in addition to any other remedy to which it might be entitled.

Signed: [signature]
Clayton D. Blehm
on behalf of all Sellers

Billabong International, Inc.

By: [signature]
Matthew Perrin
President

BIT A

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Exhibit 2

JAMES M. PETERSON, ESQ. (Bar No. 137837)
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ALEXIS S. GUTIERREZ, ESQ. (Bar No. 190487)
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Attorneys for Defendants and Cross-Complainants
DC SHOES, INC., KENNETH BLOCK AND DAMON WAY

TRACK ___ EXHIBIT 18
DATE 7/23/07
WITNESS: Kintz
34 PAGE(S)
LAURA TAYLOR MARTIN CSR NO. 4158

ORIGINAL

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

NORTH COUNTY DIVISION

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation,

Plaintiffs,

v.

DC SHOES, INC., a California corporation; BILLABONG INTERNATIONAL LIMITED, a corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; and DOES 1 through 25, inclusive,

Defendants.

CASE NO. GIN 024468

DC SHOES, INC., DAMON WAY AND KENNETH BLOCK'S SECOND AMENDED CROSS-COMPLAINT AGAINST CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997, and FDC INVESTMENTS, INC. FOR DAMAGES FOR:

(1) BREACH OF FIDUCIARY DUTY;
(2) BREACH OF DUTY OF UNDIVIDED LOYALTY;
(3) FRAUD: INTENTIONAL MISREPRESENTATION;
(4) FRAUD: NEGLIGENT MISREPRESENTATION;
(5) BREACH OF CONTRACT;
(6) BREACH OF CONTRACT;
(7) CONVERSION;
(8) IMPOSITION OF CONSTRUCTIVE TRUST
(10) BREACH OF CONTRACT
(11) ACCOUNT STATED
(12) RESCISSION
(13) REMOVAL OF DIRECTOR [CORP. CODE § 304]
(14) DECLARATORY RELIEF

Court's Ex. 018-1
Case # GIN 054897
Rec'd ___
Dept ___ Clk ___

JAMES M. PETERSON, ESQ. (Bar No. 137837)
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Attorneys for Defendants and Cross-Complainants
DC SHOES, INC., KENNETH BLOCK AND DAMON WAY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

NORTH COUNTY DIVISION

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation, Plaintiffs, v. DC SHOES, INC., a California corporation; BILLABONG INTERNATIONAL LIMITED, a corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; and DOES 1 through 25, inclusive, Defendants.	CASE NO. GIN 024468 **DC SHOES, INC., DAMON WAY AND KENNETH BLOCK'S SECOND AMENDED CROSS-COMPLAINT AGAINST CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997, and FDC INVESTMENTS, INC. FOR DAMAGES FOR:** **(1) BREACH OF FIDUCIARY DUTY;** **(2) BREACH OF DUTY OF UNDIVIDED LOYALTY;** **(3) FRAUD: INTENTIONAL MISREPRESENTATION;** **(4) FRAUD: NEGLIGENT MISREPRESENTATION;** **(5) BREACH OF CONTRACT;** **(6) BREACH OF CONTRACT;** **(7) CONVERSION;** **(8) IMPOSITION OF CONSTRUCTIVE TRUST** **(10) BREACH OF CONTRACT** **(11) ACCOUNT STATED** **(12) RESCISSION** **(13) REMOVAL OF DIRECTOR [CORP. CODE § 304]** **(14) DECLARATORY RELIEF**

018-2

DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; Cross-Complainants, v. CLAYTON D. BLEHM, an Individual; FDC INVESTMENTS, INC., a California Corporation; CLAYTON BLEHM LIVING TRUST 1997; DC SHOES (as mandated by statute only on the Tenth Cause of Action) and ROES 1-25, inclusive, Cross-Defendants.	CASE FILED: OCTOBER 1, 2002 DEPT: 30 IC JUDGE: THOMAS P. NUGENT TRIAL DATE: JANUARY 9, 2004

GENERAL ALLEGATIONS

1. Cross-Complainant DC SHOES, INC., formerly known as, CIRCUS DISTRIBUTION, CIRCUS DISTRIBUTION, INC. ("DC SHOES" or "Cross-Complainants") is, and at all relevant times has been, a corporation authorized to do and doing business in San Diego County, California.

2. Cross-Complainant KENNETH BLOCK ("BLOCK" or "Cross-Complainants") is, and at all relevant times has been, a resident of San Diego County, California.

3. Cross-Complainant DAMON WAY ("WAY " or "Cross-Complainants") is, and at all relevant times has been, a resident of San Diego County, California.

4. Cross-Complainants are informed and believe that Cross-Defendant CLAYTON D. BLEHM ("BLEHM," or collectively "Cross-Defendants") is, and at all relevant times has been, an individual residing in San Diego County, California.

5. Cross-Complainants are informed and believe that Cross-Defendant FDC INVESTMENTS, INC. (hereinafter "FDC," or collectively "Cross-Defendants") is, and at all relevant times has been, a corporation authorized to do and doing business in San Diego County, California.

6. Cross-Complainants are informed and believe that Cross-Defendant CLAYTON BLEHM LIVING TRUST 1997 (hereinafter "TRUST, " or collectively "Cross-Defendants") is, and at all relevant times has been, a revocable estate planning TRUST established by BLEHM to hold his assets, including all shares of FDC.

7. Cross-Defendant DC SHOES is named in the eleventh cause of action brought by Shareholders, WAY and BLOCK as a mandatory party pursuant to Corp. Code Section 304. Other than as explicitly stated in the eleventh cause of action reference to "Cross-Defendants" shall not refer to or include DC SHOES.

8. ROES 1-25, inclusive, are persons and/or entities that participated in, caused or committed the wrongful acts complained of. At this time, Cross-Complainants are unaware of the true names and capacities of said ROE Defendants, and therefore sues said ROE Defendants by such fictitious names. Cross-Complainants will seek leave to amend this Cross-Complaint when the true names and capacities of said ROE Defendants are ascertained.

9. Cross-Complainants are informed and believe, and upon such information and believe allege that at all times relevant to the Complaint, each of the BLEHM related Cross-Defendants including ROES 1 through 25 inclusive, was the agent, servant, representative, partner, joint venturer or employee of the other BLEHM related Cross-Defendants. In doing the acts alleged in this Cross-Complaint, each of the BLEHM related Cross-Defendants was acting within the scope of said agency, service, representation, partnership, venture or employment with the permission, ratification, consent and authority of the other Cross-Defendants.

10. Cross-Complainants are further informed and believe and thereon allege that at all times relevant to the Cross-Complaint, each of the BLEHM related Cross-Defendants were engaged in a common plan or conspiracy to unlawfully cause financial harm and injury to the Cross-Complainants, and in committing the acts and omissions alleged in this Complaint, were acting within the course and scope of, and in furtherance of, this common plan or conspiracy.

11. In or about late 1992 or early 1993, DC SHOES engaged BLEHM as its Controller.

12. Prior to engaging BLEHM in that capacity, BLEHM made certain express, oral and implied representations to Cross-Complainants relating to his skills, qualifications, experience and intentions relating to financial and business advice and the general business, finance, tax and accounting practices, policies and procedures of a corporation involved in commerce.

13. Cross-Complainants are informed and believe that at the time of his hire, BLEHM (individually and through FDC) entered into an express, oral and implied contract with Cross-Complainants to set up, monitor and maintain an efficient, lawful, compliant and organized finance and accounting department for DC SHOES. BLEHM and FDC further agreed to maintain and keep all business confidential and proprietary information relating to the operation of the company confidential and to refrain from disclosing the same to any third party without a need to know. BLEHM and FDC were obligated to perform their services to the best of their ability and to always act in the best interest of the company and in full compliance with all laws and regulations.

14. WAY and BLOCK relied upon BLEHM's representations and entrusted him with responsibility for developing, implementing and managing the business generally and the finance, tax and accounting aspects of the business specifically, so that they could focus on the design, development, and marketing of products for the company.

15. BLEHM was then tasked with and assumed the responsibility for establishing, implementing and monitoring all financial, accounting and tax functions of the company including his own relationship with DC SHOES.

16. BLEHM had previously established FDC as a business entity and had some "loss carry forwards" from some prior business losses. In order to shelter income and avoid paying taxes on income derived from DC SHOES, BLEHM suggested that an oral contract between DC SHOES and FDC be created whereby DC SHOES contracted with FDC to receive BLEHM's services and BLEHM then acted as an employee of FDC.

Cross-Complainants relied upon the recommendations, the knowledge and experience of BLEHM relating to this arrangement, and relied upon BLEHM to establish and maintain the relationship in a manner that was legal and proper for tax, accounting and other business purposes.

17. Commencing in 1993, BLEHM accepted responsibility for setting up and directing compensation arrangements for all of the company key executives including himself, WAY and BLOCK. He was also charged with and accepted responsibility for assuring that the total benefits and compensation paid to these three key executives was equal at the end of the year. Accordingly, at the end of each year, BLEHM would conduct an "equity adjustment" to balance out the equities. However, when performing these equity adjustments, Cross-Complainants have now learned that BLEHM did not consider all of the benefits he derived from the corporation either directly or through his alter egos FDC and TRUST. In fact, BLEHM undertook efforts to hide these transactions from BLOCK and WAY including threatening to terminate employment of employees who became aware of the inequities if they communicated the true facts to BLOCK and/or WAY. As a result, there was an imbalance of the equities for payments BLEHM received relative to BLOCK and WAY.

18. On or about July 31, 1995 BLEHM performed an "adjustment to compensation." His analysis claimed that from 1993 - July 31, 1995, BLEHM had received compensation and benefits that exceeded the other key executives by some $25,000. To balance the alleged inequity, FDC wrote a check to DC SHOES for $25,000. Shortly thereafter, BLEHM was given an option to obtain a one-third interest in the company in exchange for his representations and commitments that he had, and would continue to organize, develop, implement and manage all financial and accounting aspects of the business in a proper and lawful manner. Ultimately, through his efforts to keep the true facts from BLOCK and WAY, BLEHM was able to hide the fact that he had not established proper, lawful business, finance, tax and accounting practices but had established, implemented and directed activities that were contrary to IRS regulations and

guidelines, contrary to proper accounting guidelines and standards and inconsistent with his prior representations. BLOCK and WAY relied upon BLEHM's representations and were not able to determine the true facts until the IRS issued an assessment in May of 2002.

19. In late 1995, BLEHM was in fact made a shareholder equal to WAY and BLOCK. BLEHM then had corporate minutes prepared to state that he had obtained DC SHOES stock for his past services. In fact, there was no consideration for the stock. BLEHM obtained the stock due to mistake, his fraud, misrepresentations, failure to carry out his duties and responsibilities, failure to disclose material facts and other misdeeds as outlined in more detail throughout the Amended Cross-Complaint. On or about November 1996, DC SHOES appointed BLEHM as its Chief Financial Officer ("CFO").

20. In or about May of 2002, BLOCK, WAY and DC SHOES learned, for the first time, that BLEHM failed to implement a sound financial management program for the company. For example, he failed to establish appropriate checks and balances for the use and record keeping of several company issued credit cards, several company automobiles, certain material company travel expenses, certain material expense reimbursement programs and compensation to third parties. BLEHM also undertook efforts to conceal his shortcomings from BLOCK and WAY by denying them access to detailed records, threatening employees with termination of employment if they shared information with BLOCK and WAY, emotionally creating trust and confidence in himself, emphasizing BLOCK and WAY's inferior knowledge and business sophistication in contrast to his own professed superior knowledge and expertise, and taking advantage of the lack of business sophistication and knowledge of BLOCK and WAY. Thus, BLOCK and WAY and for that matter, DC SHOES was unable to determine the true facts and events until May of 2002. At that time, Cross-Complainants learned that BLEHM's use of FDC to compensate him, as well as the other policies, practices and procedures implemented by BLEHM, could expose the company to substantial state and federal taxes, penalties and interest. WAY and BLOCK also learned that BLEHM's failure to

implement and manage proper financing, tax and accounting methods and controls was performed for the express purpose of benefiting BLEHM and his friends and family members.

21. On or about June 30, 2002, DC SHOES terminated BLEHM's employment after the company discovered numerous instances of BLEHM's incompetence, conversion and breaches of his fiduciary duty to the company.

22. Cross-Complainants are informed and believe that for the past several years, Cross-Defendants have secretly, intentionally, and unlawfully caused DC SHOES to financially support BLEHM, his friends, acquaintances and family members.

23. Cross-Complainants are informed and believe that Cross-Defendants secretly, intentionally, and unlawfully took/withdrew money from DC SHOES either through use of petty cash or with checks payable to BLEHM or FDC.

a. Cross-Complainants are informed and believe that Cross-Defendants secretly, intentionally, and unlawfully mischaracterized these payments and expenditures.

24. Cross-Complainants are informed and believe that Cross-Defendants intentionally, and unlawfully charged tens of thousand dollars in personal expenses to the corporate credit card issued in BLEHM's name.

a. Cross-Complainants are informed and believe that Cross-Defendants intentionally, and unlawfully concealed these personal expenses.

25. Cross-Complainants are informed and believe that Cross-Defendants secretly, intentionally, and unlawfully charged BLEHM's personal expenses to the corporate credit cards of other DC SHOES' employees, then approved payment on behalf of the company.

a. Cross-Complainants are informed and believe that Cross-Defendants secretly, intentionally, and unlawfully concealed these personal expenses.

b. Cross-Complainants are further informed and believe that BLEHM instructed employees at DC SHOES not to discuss his financial improprieties with

WAY and BLOCK under the threat of termination of employment and financial ruin.

26. Cross-Complainants are informed and believe that Cross-Defendants secretly, intentionally, and unlawfully caused DC SHOES to pay for BLEHM's personal expenses, including thousands of dollars in "telephone charges," allegedly incurred on his personal telephone.

a. Cross-Complainants are informed and believe that Cross-Defendants secretly, intentionally, and unlawfully concealed these personal expenses.

27. Cross-Defendants failed to make an appropriate accounting of the secret and unauthorized expenditures.

28. On or about January 1, 2002, the financial services agreement between DC SHOES and FDC was terminated and BLEHM became an official employee of the company.

29. Beginning in April 2002, DC SHOES began negotiations with another industry participant regarding a potential business venture. As DC SHOES' CFO, BLEHM was responsible for negotiating this opportunity and signed a non-disclosure agreement relating to the transaction on behalf of DC SHOES.

30. In furtherance of this business venture, BLEHM executed a Memorandum of Understanding ("MOU") on behalf of DC SHOES containing a Confidentiality provision regarding the propriety of the business opportunity and prospective business relationship.

31. The foregoing MOU contained an Attorneys' Fee provision providing for the recovery of fees incurred to enforce the MOU.

32. Cross-Complainants are informed and believe that Cross-Defendants intentionally publicly disclosed the negotiations and MOU in contravention of the agreement he signed, and for the express purpose of frustrating DC SHOES' business opportunity.

33. Cross-Complainants are informed and believe that the business opportunity was frustrated, costing substantial damages to BLOCK and WAY.

34. The foregoing information is a DC SHOES trade secret. The information derives independent economic value, actual and potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use. Further, as described herein, the information was the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

35. Further, as DC SHOES' CFO and Director, BLEHM was responsible for keeping the company financial records confidential, and maintaining the confidentiality of this information for DC SHOES, a close corporation.

36. Cross-Complainants are informed and believe that Cross-Defendants intentionally publicly disclosed DC SHOES' financial information including its confidential sales figures and the size of its line of credit at various times, in contravention of BLEHM-DC SHOES express, oral and implied contract and understanding, and in breach of his fiduciary duties to his employer and shareholders, for the express purpose of causing DC SHOES injury.

37. DC SHOES' financial information including its sales and credit line information is a trade secret. The information derives independent economic value, actual and potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use. Further, as described herein, the information was the subject of efforts that were reasonable under the circumstances to maintain its secrecy.

38. As a proximate result of the acts of Cross-defendants as alleged herein, Cross-Complainants have suffered considerable expenses including professional fees incurred in dealing with the consequences of his actions including, but not limited to WAY and BLOCK's personal expenses for tax returns, DC SHOES' tax returns, potential additional penalties and interest to the IRS and other expenses the exact amount to be proven at the time of trial.

ALTER EGO ALLEGATIONS

39. Cross-Complainants are further informed and believe and on that basis allege that FDC and the TRUST were mere shells, instrumentalities and conduits through which BLEHM carried on his business, exercising complete control and dominance of such entities to such an extent that any individuality or separateness of FDC, BLEHM and the TRUST does not, and at all relevant times, did not, exist.

40. By way of example, while BLEHM personally provided services to DC SHOES and ultimately provided service as the CFO of the company, from the commencement of his relationship in 1993 until January of 2002 he unilaterally implemented a system whereby his compensation was paid to FDC under an independent contractor agreement. BLEHM set up this arrangement to take advantage of some "loss carry forwards" from FDC's prior failures. Such an arrangement allowed BLEHM to shelter his income and avoid paying taxes. Unfortunately for DC SHOES, after an IRS audit, this arrangement was challenged and a tax assessment of several million dollars was imposed.

41. Cross-Complainants are informed and believe and on that basis allege that BLEHM has created the TRUST as a revocable estate planning tool for the sole purpose of placing assets owned and controlled by BLEHM. The trust conducts no business and would thus be an instrumentality to hold assets for the sole purpose of avoiding creditors. Thus, any separateness between BLEHM, FDC and the TRUST must be disregarded to avoid an inequity to cross-complainants with respect to the conduct alleged herein.

42. Cross-Complainants allege on information and belief that at all relevant times FDC was used as an instrumentality and conduit through which BLEHM carried on his business in the corporate name, commingling funds and exercising complete control and dominance of such business to such an extent that any individuality or separateness of FDC and BLEHM does not exist. By way of example, Cross-Complainants are informed and believe that BLEHM engaged in the following conduct, which constitutes complete control and dominance of FDC:

(a) BLEHM is, and has been the sole shareholder, sole director and sole officer of FDC since its inception in 1986.

(b) BLEHM has been the sole employee of FDC since December of 1990.

(c) Since 1990, FDC has not perform any services, sold any goods or engage in any commercial activities, other than providing the services of BLEHM to DC Shoes, as unilaterally arranged by BLEHM.

(d) FDC does not own any shares of any other companies or have any other ownership interests other than DC Shoes.

(e) BLEHM was using FDC as his personal piggybank, commingling funds with no regard for separateness. BLEHM testified under oath in his marital dissolution proceeding that, "The corporation [FDC] provided all of the money that occurred relative to this entire union [his marriage]. The only place that any money could have originated is with the corporation. Whether there was a transaction that was identified specifically for $25,000, $10,000, or whatever, ever occurred, I can't say. All I know is that all of the money that came into this [marriage] came through the corporation. And the corporation paid, paid off the house, paid off her kids' education, paid off all kinds of stuff via a loan account. You can't look at one transaction or another and trace them back and forth exactly."

(f) BLEHM provided full time managerial services to DC SHOES even though the contractual relationship for managerial services was between DC SHOES and FDC.

(g) At BLEHM's option, he chose to have stock issued in FDC rather than him personally because FDC had some tax benefits associated with it.

(h) BLEHM regularly issued FDC checks to his ex-wife (Hsiu-Lan Blehm) as gifts and for spousal support. At the time, he did not have a personal checking account.

(i) On January 1, 1999, BLEHM signed check no. 450 drawn on FDC's checking account at Merrill Lynch in the amount of $5,000.00 made payable to his ex-wife, Hsiu-Lan Blehm for court-ordered spousal support that BLEHM personally, not FDC, was ordered to pay to his ex-wife. BLEHM used the FDC account to keep records of his transactions because he did not have a personal checking account at the time.

(j) On January 1, 1999, BLEHM signed check no. 441 drawn on FDC's checking account at Merrill Lynch in the amount of $2,500.00 made payable to his ex-wife, Hsiu-Lan Blehm. BLEHM admitted that the check was a Christmas gift to his ex-wife.

(k) On or about April 20, 1999, BLEHM instructed DC Shoes' Controller to make payment of a dividend declared in 1997 in the amount of $100,000 to BLEHM, personally. If BLEHM were treating FDC as a separate, legitimate entity, he would have asked that the money be paid to FDC, the actual shareholder. FDC was the shareholder of record at this time– not BLEHM. This is but one example of BLEHM disregarding the corporate separateness of FDC.

(l) On or about February 13, 2002, and after the IRS audit resulting in termination of DC Shoes contract with FDC, BLEHM instructed DC Shoes controller to make a $500,000 loan from DC Shoes to him. Specifically, BLEHM directed the controller to issue a check in the amount of $500,000 from the DC Shoes operating account, payable to FDC. Notwithstanding that the loan was made payable to FDC, BLEHM stated to the controller that the transaction was a "loan" from DC Shoes to him to assist him in the purchase of a real property. In March of 2002, and after receiving the $500,000 loan, BLEHM, the TRUST and/or FDC used the loan proceeds to purchase certain real property located at 6213 Paseo Alta Rico in Carlsbad, CA 92009 (the "Investment Property") in the name of the TRUST. BLEHM, the TRUST and/or FDC sold the Investment Property in September of 2002 for $1,000,000 but never paid back the loan to DC Shoes.

(m) Finally, a review of the corporate books and records of DC Shoes reveals that the $500,000 loan was not the only transaction whereby BLEHM, the TRUST and/or FDC improperly used FDC to receive funds due to BLEHM *after* the IRS conducted its audit. BLEHM also caused DC Shoes to issue a $300,000 bonus for 2002 services to be paid to FDC and not BLEHM personally. While payment of a large bonus was not unusual for DC Shoes at the time, it was improper for BLEHM to cause DC Shoes to pay BLEHM's bonus to FDC and not BLEHM directly since as of December 31, 2001, and in response to the IRS audit, FDC no longer contracted with FDC and BLEHM was supposed to be paid through DC Shoes' payroll.

43. Cross-Complainants are informed and believe and thereon allege that adherence to the fiction of the separate existence of FDC and the TRUST as entities distinct from BLEHM would permit abuse of the corporate privilege and estate planning tools and would sanction a fraud and that, on information and belief, BLEHM would have caused hundreds of thousands of dollars to be directed to FDC and the TRUST and distributed without any consideration to FDC and the TRUST, all for the purpose of avoiding and preventing attachment and execution by creditors, including Cross-Complainants.

FIRST CAUSE OF ACTION
(Breach Of Fiduciary Duty)
(By DC SHOES Against Cross-Defendants BLEHM/FDC)

44. Cross-Complainant refers to and incorporates by reference paragraphs 1 through 43 above.

45. From 1993 through June 30, 2002, BLEHM, individually and through his alter ego, FDC, provided services to DC SHOES as business manager and controller, and later an Officer, Director and equal shareholder of the Company. While BLEHM provided the services himself, he arranged for those services to be provided by his alter ego FDC so that each year DC SHOES contracted with FDC to receive BLEHM's services. Thus, the services provided to FDC including management of the business and finances of the company were provided by both BLEHM and FDC. Thus, due to the

nature of the relationship and the manner in which services were provided, both BLEHM and FDC maintained a fiduciary relationship with DC SHOES. BLEHM/FDC was entrusted with confidential and proprietary information and granted authority to make decisions on behalf of DC SHOES, to hire and fire employees, to secure assets for the company and to carry out most business and financial functions for the business.

46. Cross-Complainant alleges on information and belief that BLEHM agreed that he would act in DC SHOES' best interests, and perform as a fiduciary to the Company.

47. As DC SHOES' business manager, Officer, Director and equal shareholder, BLEHM had a fiduciary duty to the company to, among other things:

a. Act in the best interest of the Company at all times;

b. Act only with the authority vested in him by DC SHOES.

c. Engage in no self dealing.

48. Under its contract with DC SHOES, FDC agreed to perform these same functions and undertook the same fiduciary obligation.

49. Cross-Complainant alleges on information and belief that BLEHM/FDC's position and duties obligated him to disclose all material facts known to him affecting the well-being of DC SHOES to the Company and its shareholders.

50. Cross-Complainant alleges on information and belief that BLEHM/FDC violated the trust and confidence that DC SHOES conferred in him by virtue of his various positions within the Company and by virtue of the contract between DC SHOES and BLEHM.

51. Cross-Complainant alleges on information and belief that BLEHM/FDC breached these duties by doing the acts complained of herein, causing DC SHOES damage, in the amount determined according to proof at trial.

52. Cross-Complainant alleges, on information and belief, that Cross-Defendant's intentional misuse of BLEHM's position with DC SHOES, and abuse of the fiduciary obligation vested in them, at the expense of Cross-Complainant's property or

legal rights, describe malicious, despicable conduct that subjected Cross-Complainant to an unjust hardship in conscious disregard of Cross-Complainant's rights, so as to justify an award of exemplary and punitive damages.

SECOND CAUSE OF ACTION
(Breach Of Duty Of Undivided Loyalty)
(By DC SHOES Against Cross-Defendant BLEHM)

53. Cross-Complainant refers to and incorporates by reference paragraphs 1 through 52 above.

54. From 1993 through June 30, 2002, BLEHM provided services as a DC SHOES business manager, and later an Officer, director, employee and equal shareholder of the Company.

55. Cross-Complainant alleges on information and belief that BLEHM agreed to act on behalf of DC SHOES', and not engage in any conduct antithetical to the Company's best interests to benefit himself.

56. As a DC SHOES executive manager, Officer, director and equal shareholder, BLEHM owed DC SHOES a duty of undivided loyalty to, among other things:

a. Act in the best interest of the Company at all times;

b. Act only with the authority vested in him by DC SHOES;

c. Engage in no self-dealing.

57. Cross-Complainant alleges on information and belief that BLEHM's position and duties obligated him to disclose all material facts known to him affecting the well-being of DC SHOES to the Company.

58. Cross-Complainant alleges on information and belief that BLEHM violated the trust and confidence that DC SHOES conferred in him by virtue of his various positions within the Company.

59. Cross-Complainant alleges on information and belief that BLEHM breached his duties by doing the acts complained of herein, causing DC SHOES damage, in the amount determined according to proof at trial.

60. Cross-Complainant alleges on information and belief that BLEHM breached his duties by doing the acts complained of herein, causing DC SHOES damage, in the amount determined according to proof at trial.

61. Cross-Complainant alleges, on information and belief, that Cross-Defendant BLEHM's intentional misuse of his position with DC SHOES, and abuse his duty of undivided loyalty obligation vested in him, at the expense of Cross-Complainant's property or legal rights, describe malicious, despicable conduct that subjected Cross-Complainant to an unjust hardship in conscious disregard of Cross-Complainant's rights, so as to justify an award of exemplary and punitive damages.

THIRD CAUSE OF ACTION
(Fraud: Intentional Misrepresentation)
(By all Cross-Complainants Against Cross-Defendants BLEHM/TRUST/FDC)

62. Cross-Complainants refer to and incorporate by reference paragraphs 1 through 61 above.

63. Cross-Complainants allege on information and belief that BLEHM, individually and through his alter egos FDC and TRUST (collectively "BLEHM") made representations as to past and existing material facts as herein alleged throughout his relationship with the company both individually and through FDC's contract with the company. Furthermore, Cross-Defendants omitted to state material facts that if known to BLOCK and WAY would have caused them to alter their course of conduct and all actions undertaken with respect to BLEHM/FDC.

64. The fraudulent representations and/or omissions made by BLEHM/FDC were made to Mr. WAY and Mr. BLOCK throughout his working time at the company and include but are not limited to:

a. Representations that he had developed, implemented and established appropriate and lawful finance accounting and tax policies and procedures for the company including a promise and commitment to continue to do the same in the future;

b. Representations that he would compensate himself equally with the other key executives and shareholders;

c. Failing to advise Mr. BLOCK and Mr. WAY that he, in fact, had not paid equal compensation to the other key executives;

d. Representations that he had not and would not engage in self dealing;

e. Representations that he had not and would not utilize company assets for his own personal benefit or the benefit of his family, friends and acquaintances;

f. Failing to advise the other shareholders and key executives that he had in fact engaged in self dealing and utilized company assets for the benefit of himself, his family, friends and acquaintances;

g. Representations that he had established an appropriate relationship as between himself and the company relating to the services provided;

h. Representations and omissions relating to the proper finance, accounting and tax policies and procedures relating to corporate expenses; and

i. Representations that he was experienced and competent to manage the business generally and the finance, accounting and tax functions specifically.

j. Representations that the management contract between FDC and DC SHOES for the services of BLEHM, CPA as business manager and controller and later CFO was an appropriate and proper method to obtain such services;

k. Mr. BLEHM also withheld material facts concerning the improper nature of his relationship with the company, his use of company assets for the unauthorized benefit of himself and his friends, acquaintances and family members, his failure to compensation the key executives equally and failure to establish appropriate financial policies, controls and procedures.

65. Cross-Complainants allege on information and belief that the representations were false. BLEHM/FDC had not, in fact discharged their duties outlined herein and failed to establish the proper business, finance, tax and accounting programs for the company. BLEHM/FDC likewise did not intend to perform these functions in a

lawful and proper manner when they represented that they would. BLEHM/FDC also undertook efforts to conceal the true facts from BLOCK and WAY as more particularly set forth herein. As a result, WAY and BLOCK did not and could not with reasonable diligence learn of the falsity of the above referenced representations until a business transaction brought these issue to light in or about May of 2002. BLEHM/FDS/TRUST also withheld material information that had it been know to Cross-Complainants would not have acted in the manner that they did.

66. Cross-Complainants allege on information and belief that BLEHM's representations were false when made, and made with the intent to defraud Cross-Complainants.

67. Cross-Complainants were unaware of the falsity of the representations, and acted in reasonable reliance upon the truth of BLEHM's representations.

68. Cross-Complainants sustained damage as a result of their acting in reliance on BLEHM/FDC's statements and omissions. DC SHOES has among other things suffered the loss of profits due to the fraud, false representations and omissions and faces IRS taxes, penalties and interest as a result of BLEHM/FDC's conduct. BLOCK and WAY have lost compensation, benefits and given up a portion of their stock in DC SHOES to BLEHM/FDC in reliance upon his false representations and failure to perform his duties as represented.

69. The foregoing conduct of BLEHM/FDC describes acts of intentional misrepresentation, deception and/or concealment of material facts known to BLEHM/FDC. These acts were perpetrated by BLEHM/FDC for the purpose of securing DC SHOES stock from WAY and BLOCK and otherwise depriving Cross-Complainants of their property and legal rights or otherwise causing injury, and describe despicable conduct that subjected Cross-Complainants to an unjust hardship in conscious disregard of their rights, so as to justify an award of exemplary and punitive damages.

FOURTH CAUSE OF ACTION
(Fraud: Negligent Misrepresentation)
(By all Cross-Complainants Against Cross-Defendants BLEHM/TRUST/FDC)

70. Cross-Complainants refer to and incorporate by reference paragraphs 1 through 69 above.

71. Cross-Complainants allege on information and belief that BLEHM, individually and through his alter egos FDC and TRUST (collectively "BLEHM"), negligently made representations as to past and existing material facts as herein alleged.

72. Cross-Complainants allege on information and belief that the representations were made without reasonable grounds for believing them to be true.

73. Cross-Complainants were unaware of the falsity of the representations, and acted in reasonable reliance upon the truth of BLEHM's representations.

74. Cross-Complainants sustained damage as a result of their reliance on BLEHM's statements.

FIFTH CAUSE OF ACTION
(Breach of Contract)
(By BLOCK and WAY Against Cross-Defendants BLEHM, TRUST and FDC)

75. Cross-Complainants refer to and incorporate by reference paragraphs 1 through 74 above.

76. In paragraph 44 of the complaint, BLEHM has alleged that he, BLOCK and WAY "repeatedly agreed, both orally and in writing, that each would be compensated equally for their respective services to DC." BLOCK and WAY acknowledge that such an agreement existed as between them and BLEHM/FDC/TRUST for the period that each remained employed by, and thus provided services to, DC SHOES. Thus, the agreement terminated upon the termination of BLEHM's employment.

77. BLOCK and WAY performed each and every obligation required of them under the agreement including performing their obligations to each other and the company to the best of their ability and in a lawful and appropriate manner, reporting income and benefits each received in order to allow BLEHM to calculate and make the "equity adjustments" on an annual basis.

78. BLEHM/FDC/TRUST breached the agreement by among other things:

a. not reporting all income and benefits received;

b. not disclosing the excessive use of company credit cards including use of other employees cards for BLEHM/FDC/TRUST's personal benefit;

c. misuse of petty cash and travel expenses;

d. use of company assets for personal benefit including use for the benefit of friends, acquaintances and family that were not disclosed or considered in the equity adjustments; and

e. other abuses of the company assets which create a disproportionate allocation of corporate distributions to BLEHM relative to BLOCK and WAY.

79. As a result of the breaches of the agreement outlined above, WAY and BLOCK have suffered damages in an amount to be proven at trial.

SIXTH CAUSE OF ACTION
(Breach of Contract)
(By DC SHOES Against Cross-Defendants BLEHM/TRUST/FDC)

80. Cross-Complainant refers to and incorporates by reference paragraphs 1 through 79 above.

81. From late 1992 through December of 2001, DC SHOES entered into a series of purported contracts with FDC whereby FDC agreed to provided the services of BLEHM, CPA to act as the controller and business manager and ultimately the CFO for DC SHOES. Under the terms of the agreements, the services contracted for were to be provided by BLEHM. Cross-Complaints understood and relied upon the fact that the agreement contemplated that BLEHM would perform the services in a proper, ethical, legal and business like manner and in a manner consistent with generally accepted tax and accounting practices.

82. DC SHOES performed its obligation under the agreement and compensated FDC/BLEHM in a manner consistent with the agreement.

83. FDC breached the agreement by failing to provide the services contracted for in a proper and lawful manner and by virtue of the material breaches of duty, misrepresentations and omissions as set forth herein.

84. As a direct and proximate result of the breach of the agreement, DC SHOES has suffered damages in an amount to be proven at the time

SEVENTH CAUSE OF ACTION
(Conversion)
(By DC SHOES Against Cross-Defendants BLEHM/TRUST/FDC)

85. Cross-Complainants refer to and incorporate by reference paragraphs 1 through 84 above.

86. As the business manager, controller, and later Chief Financial Officer and director of DC SHOES, BLEHM was entrusted with DC SHOES' assets, including access to cash accounts, corporate credit cards, and the like. BLEHM abused this trust and converted specific, identifiable sums of money from DC SHOES for his personal benefit.

87. BLEHM repeatedly took money from the corporation to fund personal trips, in the guise of business travel "per diems." BLEHM converted $74,500.00 in this manner.

88. BLEHM also converted sums from DC SHOES by causing DC SHOES to issue monthly payments to female escorts in Korea who he retained for services during his alleged "business trips" to Korea. BLEHM converted $34,000.00 in this manner.

89. BLEHM also converted sums from DC SHOES to pay for his personal residence telephone bill. BLEHM converted $4,509.40 in this manner.

90. BLEHM also converted funds from DC SHOES by charging personal expenses on his corporate, American Express card. BLEHM converted $199,283.83 in this manner.

91. BLEHM also converted funds from DC SHOES by charging personal expenses on his corporate, Visa/First Bankcard. BLEHM converted $56,886.13 in this manner.

92. BLEHM also converted sums from DC SHOES which he used for personal travel and entertainment to Las Vegas, Hawaii, and other vacation destinations. BLEHM converted $21,461.09 in this manner.

93. BLEHM also converted funds from DC SHOES from January 1, 2002 through the date of his termination on June 30, 2002 in the same manner as previous years, as described above. BLEHM converted $275,391.79 during this time period.

94. Based on the foregoing, Cross-Defendants have converted the total sum of $666,032.24 from DC SHOES.

95. At all times relevant, DC SHOES owned, possessed and had the sole right to the assets that were entrusted to BLEHM, which he wrongfully converted for Cross-defendants' gain.

96. Cross-Complainant is informed and believes, and thereon alleges, that each of the named Cross-Defendants, individually and in a conspiracy with one another, interfered with the assets described above, by wrongfully converting DC SHOES' assets for their personal gain.

97. Each of the named Cross-Defendants' interference with the property described above, and in the manner described above, was substantial, resulting in the specific and quantifiable conversion of $666,032.24.

98. Cross-Defendants' interference with the foregoing assets was intentional, and as previously alleged, accomplished with stealth and deception.

99. As a proximate result of each named Cross-Defendants' conversion of DC SHOES' property, Cross-Complainant has suffered actual damages in an amount to be proven at trial.

100. Cross-Complainant is informed and believes, and thereon alleges, that the aforementioned acts and conduct of each named Cross-Defendant were willful, oppressive and malicious and undertaken with the intent to injure Cross-Complainant's business and

improve their respective business interests. Cross-Complainant is therefore entitled to punitive and exemplary damages.

EIGHTH CAUSE OF ACTION
(Imposition of Constructive Trust -Fraud and Unjust Enrichment)
[Civil Code §§ 2223 and 2224]
(By all Cross-Complainants Against all Cross-Defendants)

101. Cross-Complainant refers to and incorporates by reference paragraphs 1 through 100 as though fully set forth herein.

102. During the period of BLEHM/FDC/TRUST's employment and contractual relationship with DC SHOES, BLEHM/FDC/TRUST embezzled, converted and fraudulently obtained assets belonging to DC SHOES through the improper payments to BLEHM and his acquaintances, friends and family members and through inequitable distributions of profits more particularly set forth above.

103. As a result of Cross-Defendants' false, fraudulent and deceptive receipt of money for BLEHM's own personal benefit and the benefit of his friends, acquaintances and family members Cross-Defendants have misappropriated and converted to their personal use a specified sum of money, the exact amount which was presently unknown to the Cross-Complainants but at least in the amount of $1 million.

104. The Cross-Defendants have received the sum outlined above and placed it either in an account belonging to FDC, TRUST or BLEHM. Had Cross-Defendants acted properly DC SHOES would have had additional cash available for its operations and Cross-Complainants' BLOCK and WAY would have received more money from the

105. company based on the executive's agreement of equal compensation for the period of employment.

106. By virtue of the Cross-Defendants' wrongful acts, they hold the converted funds in excess of $1 million as a constructive trustee for the benefit of the Cross-Complainants.

107. Furthermore, by virtue of the Cross-Defendants' false representations that they would perform their services in a proper and businesslike manner and not convert

assets for their own use and benefit as well as Cross-Defendant BLEHM's agreement with BLOCK and WAY to distribute monies equally among them, Cross-Complainant's have suffered damages in an amount to be proven at the time of trial.

108. By virtue of Cross-Defendants' fraudulent acts they also hold the property described above as a constructive trustee for the Cross-Complainants' benefit.

TENTH CAUSE OF ACTION

(Breach of Contract)

(By DC SHOES Against Cross-Defendants BLEHM/TRUST/FDC)

109. Cross-Complainants refer to and incorporate by reference paragraphs 1 through 108 above.

110. On or about February 13, 2002 BLEHM directed that the controller for DC SHOES issue a check from the DC SHOES operating account, payable to FDC INVESTMENTS in the amount of $500,000. Mr. BLEHM further stated that the transaction was a loan from DC SHOES to him to assist him in purchase a new home.

111. On or about February 13, 2002, a record was made in the accounting department at DC SHOES reflecting a loan from DC SHOES to FDC INVESTMENTS in the amount of $500,000 "due in 15 days."

112. As a result of the above transaction, a contract was created between BLEHM, his alter egos FDC INVESTMENTS and TRUST and DC SHOES; under the terms of the contract, DC SHOES agreed to loan BLEHM/TRUST/ADC the sum of $500,000 on February 13, 2002 with the loan due and payable "in 15 days" or on February 28, 2002.

113. DC SHOES performed each of its obligations under the agreement and did, in fact, loan the money to BLEHM/FDC/TRUST. There is now due and owing to DC SHOES by BLEHM/TRUST/FDC the sum of $500,000. BLEHM/TRUST/FDC have breached the agreement by refusing to pay the amount owed despite demand for repayment thereof.

114. As a result of the breach of the agreement by BLEHM/TRUST/FDC, DC SHOES has suffered damages at least in the amount of $500,000 plus interest thereon at the legal rate.

ELEVENTH CAUSE OF ACTION
(Account Stated)
(By DC SHOES Against all BLEHM/TRUST/FDC)

115. Cross-Complainant refers to and incorporates by reference paragraphs 1 through 114 above.

116. Within the last four years, an account was stated in writing by and between DC SHOES and BLEHM/TRUST/FDC in which it was agreed that BLEHM/TRUST/FDC were indebted to DC SHOES in the amount of $500,000.

117. No part of said sum has been paid, although demand therefore has been made and there is now due, owing and unpaid from BLEHM/TRUST/FDC to DC SHOES the above-referenced amount, together with interest thereon at the rate of 10 percent per annum from and after the date the loan became past due pursuant to California Civil Code section 3289.

TWELFTH CAUSE OF ACTION
(Rescission based on Fraud in the Inducement, Failure of Consideration, Mistake, Constructive Fraud and Breach of Duty)
(By DC SHOES, WAY and BLOCK Against Cross-Defendants BLEHM, TRUST and FDC)

118. Cross-Complainants refer to and incorporate by reference paragraphs 1 through 117 above.

119. Consistent with the agreement outlined above and in reliance upon the representations set forth above, WAY and BLOCK agreed to transfer to BLEHM through his alter egos TRUST and FDC (collectively "BLEHM") sufficient shares of DC SHOES stock to provide him a one-third interest in the company. Thus, WAY and BLOCK's interest in the company was reduced from 50% to 33 1/3%

120. When Cross-Complainants agreed to provide BLEHM a one-third interest in the company they did so based on the representations, based on their mistaken

understanding of BLEHM's conduct and activities and for the consideration set forth herein including but not limited to:

a. BLEHM's representations and omissions about his background, skills and experience in establishing, implementing and managing financial, tax and accounting controls for the company;

b. BLEHM/FDC's promise to and BLEHM/FDC's representations that he had, in fact established and implemented proper financial, tax and accounting controls and policies for the company;

c. BLEHM/FDC's promise to and BLEHM/FDC's representations that he had not and would not engage in self-dealing and would treat each of the key executives and shareholders equally for compensation purposes;

d. BLEHM/FDC's promise to and BLEHM/FDC's representations that he had not breached his fiduciary obligations and duty of loyalty to the company;

e. BLEHM/FDC's promise to and BLEHM/FDC's representations that he had established company finance and accounting policies and procedures that would comply with the law including all tax laws and regulations;

f. BLEHM/FDC's promise to and BLEHM/FDC's commitment to not convert assets of the company to their own personal benefit or to benefit of BLEHM's friends, acquaintances and family members; and

g. other false and misleading representations and omissions made by BLEHM/FDC relating to his past performance and promises for future lawful performance of his duties in exchange for the DC SHOES stock.

121. In or about May of 2002, DC SHOES, WAY and BLOCK learned of the falsity of the representations made above and the failure to perform the duties and responsibilities entrusted to BLEHM and provided under contract with FDC. They also learned that the services of BLEHM, CPA as business manager and controller and later CFO had not been performed in a lawful, proper, ethical manner. BLEHM was responsible for taking action to withhold the true facts and cause Cross-Complainant's

mistaken belief as to his, skills, qualifications, performance, actions and activities. Cross-Complaint's performed their obligations to the company and reasonably relied upon BLEHM's statements and representations to their determent. Had they know the true facts, BLOCK and WAY would not have acted the way they did and would not have authorized the issuance of shares in DC SHOES to BLEHM/FDC/TRUST.

122. Furthermore, BLEHM/FDC failed to provide or perform their obligations under the agreement such that there has been a failure of consideration and/or an absence of consideration.

123. BLEHM/FDC/TRUST had a fiduciary duty to the company and the individual Cross-Complainants and created a confidential relationship by virtue of their relationship, duties, obligations and positions with one another. BLOCK and WAY reposed their trust and confidence in BLEHM/FDC/TRUST to perform in a proper, legal, ethical and business-like manner and relied upon the integrity and fidelity of BLEHM/FDC/TRUST. Cross-Defendants gained an advantage over BLOCK and WAY and prejudicially misled them.

124. WAY and BLOCK would suffer substantial harm and injury under the agreement if it were not rescinded in that as a result of Cross-Defendants' conduct, Cross-Complainants will be and have been deprived of their bargain having performed their obligations to BLEHM and relied upon his representations. Cross-Complainants were not aware of his omissions and authorized the stock issuance as a result of Cross-Defendants' fraud, misrepresentations, omissions, breach of duty and failure to perform their obligations under the agreement. Cross-Complainant's were also mistaken as to the true facts and would not have acted as they did were it not for Cross-Defendants actions to intentionally mislead them.

125. Cross-Complainants intend service of this Cross-Complainant to serve as notice of rescission of the agreement to issue DC SHOES stock to BLEHM/FDC sufficient to provide him a one-third interest in the company and hereby demand that BLEHM/FDC return and transfer back to BLOCK and WAY in an equal amount or return

to DC SHOES any and all rights and interest Cross-Defendants BLEHM/FDC/TRUST and their agents and assigns hold or claim to hold in DC SHOES.

126. In performing the acts alleged herein, BLEHM/FDC intentionally misrepresented the true facts, failed to disclose all material facts and failed to perform their obligations under the agreement. Cross-Defendants' acts were performed with the intent to deprive Cross-Complainants of the benefit of their bargain.

127. As a proximate result of the acts of Cross-defendants as alleged herein, Cross-Complainants have suffered considerable expenses in addition to those alleged above including professional fees incurred in dealing with the consequences of BLEHM/FDC/s actions including, but not limited to WAY and BLOCK's personal tax returns, DC SHOES' tax returns, potential additional penalties and interest to the IRS and other related expenses the exact amount to be proven at the time of trial.

128. Cross-Complainants are informed and believe, and thereon allege, that the aforementioned acts and conduct of each named Cross-Defendant was willful, oppressive and malicious and undertaken with the intent to injure Cross-Complainants' business and improve their respective business interests. Cross-Complainants are therefore entitled to punitive and exemplary damages.

THIRTEENTH CAUSE OF ACTION
(Removal of Director)
[Cal. Corp. Code Section 304]
(By WAY and BLOCK Against Cross-Defendant BLEHM and DC SHOES)

129. Cross-Complainants refer to and incorporate by reference paragraphs 1 through 128 above.

130. Cross-Complainants WAY and BLOCK are the holders of record of more than 10% of the issued and outstanding shares of DC SHOES stock. DC SHOES is nominally named as a party to this action pursuant to the provisions of Cal. Corp. Code Section 304.

131. In accordance with the provisions of the bylaws of DC SHOES, it is provided that the corporation shall have a board of directors consisting of three members. Currently, BLOCK, WAY and BLEHM serve as directors of DC SHOES.

132. Subsequent to his election as a director, BLEHM has continuously and repeatedly engaged in fraudulent and dishonest acts and gross abuse of his authority and discretion with reference to his obligations to DC SHOES and its shareholders.

133. Such acts include but are not limited to the fraudulent and deceptive misuse, misappropriation and abuse of corporate assets as set forth above and the use and misuse of corporate assets for BLEHM's personal benefit and the benefit of his friends, acquaintances and family members. Furthermore, BLEHM has defrauded the company and its shareholders relative to the compensation and benefits he has derived relative to the other key executives. BLEHM has also impaired a substantial business deal by failing to negotiate in good faith, failing to set realistic goals and demands relative to the transaction and failing to act in the best interest of the company and its shareholders.

134. discretion over several years to the detriment of the corporation and its shareholders. WAY and BLOCK are informed and believe and therefore allege that BLEHM's conduct will continue if he is allowed to remain a member of the board of directors.

135. As a result of BLEHM's actions WAY and BLOCK have suffered damages including loss of profits for the corporation, additional expenses to remedy the wrongs perpetrated by BLEHM and other damages the precise amount to be determined at the time of the trial on this matter.

FOURTEENTH CAUSE OF ACTION
(Declaratory Relief)
(By WAY and BLOCK Against All Cross-Defendants)

136. Cross-Complainants refer to and incorporate by reference paragraphs 1 through 135 above as though fully set forth herein.

137. On or about January 1, 1999, FDC INVESTMENTS, INC., KENNETH BLOCK and DAMON WAY (collectively "Shareholders") signed a Shareholder

Agreement. Under the terms of the Shareholder Agreement, the shareholders agreed that no shareholder may transfer, sell, assign, hypothecate, encumber or alienate any of the shares of the corporation without the express written consent of all of the shareholders.

138. BLOCK and WAY believe that the referenced Shareholder Agreement was obtained under false and fraudulent pretenses, is an unfair restraint on alienation and an unreasonable restriction on the transfer of shares and therefore void, illegal and unenforceable.

139. BLEHM contends that the Shareholder Agreement is binding, valid and enforceable.

140. Accordingly, a declaration from this court is needed as to the rights and responsibilities of the parties and the validity of the Shareholder Agreement.

PRAYER

WHEREFORE, Cross-Complainants prays for judgment against Cross-Defendants CLAYTON D. BLEHM, FDC INVESTMENTS, INC., and TRUST on all causes of action, as follows:

A. ON THE FIRST CAUSE OF ACTION:

1. For damages to be proven at the time of trial;
2. For interest to be determined at trial;
3. For costs of suit herein incurred;
4. For reasonable attorneys' fees in a sum according to proof;
5. For exemplary damages in a sum according to proof; and
6. For such other and further relief as the court may deem just and proper.

B. ON THE SECOND CAUSE OF ACTION:

1. For damages to be proven at the time of trial;
2. For interest to be determined at trial;
3. For costs of suit herein incurred;
4. For reasonable attorneys' fees in a sum according to proof;

5. For exemplary damages in a sum according to proof; and
6. For such other and further relief as the court may deem just and proper.

C. **ON THE THIRD CAUSE OF ACTION:**

1. For damages to be proven at the time of trial;
2. For interest to be determined at trial;
3. For costs of suit herein incurred;
4. For reasonable attorneys' fees in a sum according to proof;
5. For exemplary damages in a sum according to proof; and
6. For such other and further relief as the court may deem just and proper.

D. **ON THE FOURTH CAUSE OF ACTION:**

1. For damages to be proven at the time of trial;
2. For interest to be determined at trial;
3. For costs of suit herein incurred;
4. For reasonable attorneys' fees in a sum according to proof;
5. For such other and further relief as the court may deem just and proper.

E. **ON THE FIFTH CAUSE OF ACTION:**

1. For damages to be proven at the time of trial;
2. For interest to be determined at trial;
3. For costs of suit herein incurred;
4. For reasonable attorneys' fees in a sum according to proof;
5. For such other and further relief as the court may deem just and proper.

F. **ON THE SIXTH CAUSE OF ACTION:**

1. For damages to be proven at the time of trial;
2. For interest to be determined at trial;
3. For costs of suit herein incurred;
4. For reasonable attorneys' fees in a sum according to proof;
5. For exemplary damages in a sum according to proof; and
6. For such other and further relief as the court may deem just and proper.

G. ON THE SEVENTH CAUSE OF ACTION:

1. For damages to be proven at the time of trial;

2. For interest to be determined at trial;

3. For costs of suit herein incurred;

4. For reasonable attorneys' fees in a sum according to proof;

5. For exemplary damages in a sum according to proof; and

6. For such other and further relief as the court may deem just and proper.

H. ON THE EIGHTH CAUSE OF ACTION:

1. For an order declaring that Cross-Defendants owe sums of money improperly obtained through fraud and embezzlement and conversion of funds at least in the amount of $1 million in trust for the Cross-Complainants;

2. For an order compelling the Cross-Defendants to convey to the Cross-Complainants the sums identified in this action;

3. For an accounting of all monies owing to the Cross-Complainants;

4. For damages in the amount of all monies found owing to the Cross-Complainants;

5. For interest to be determined at trial;

6. For cost of suit herein incurred;

7. For such other and further relief as the court may deem just and proper.

I. ON THE TENTH CAUSE OF ACTION:

1. For compensatory damages in an amount to be proven at the time of trial;

2. For costs of suit herein incurred; and

3. For such and further relief as the court deems just and proper.

J. ON THE ELEVENTH CAUSE OF ACTION:

1. For the principal sum of $500,000;

2. For interest on said principal sum accrued from February 28, 2002, at the rate of 10 percent per annum pursuant to California Civil Code section 3289;

3. For costs of suit herein incurred; and

4. For such and further relief as the court may deem just and proper.

K. ON THE TWELFTH CAUSE OF ACTION:

1. For an Order rescinding the transfer of stock in DC SHOES from WAY and BLOCK to the Cross-Defendants and requiring that all shares in DC SHOES be returned to BLOCK and WAY in an equal amount;

2. For compensatory damages to be proven at the time of trial;

3. For damages in an amount necessary to prevent Cross-Defendant's unjust enrichment, and each of them, according to proof;

4. For exemplary damages in a sum according to proof;

5. For costs of suit herein incurred;

6. For reasonable attorneys' fees in a sum according to proof, and

7. For such other and further relief that the court sitting in equity deems just and equitable.

L. ON THE THIRTEENTH CAUSE OF ACTION:

1. For an Order or Judgment directing Cross-Defendants to be cited to appear and answer this complaint;

2. For an Order or Judgment removing BLEHM from office as a director of the corporation, DC SHOES;

3. For an Order or Judgment barring BLEHM or his agents and assigns from reelection as a director of DC SHOES for a period of 5 years or for such period of time as the Court deems just and proper;

4. For costs of suit herein incurred;

5. For reasonable attorneys' fees in a sum according to proof, and

6. For such other and further relief that the court sitting in equity deems just and equitable.

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M. ON THE FOURTEENTH CAUSE OF ACTION:

1. For a declaration of the rights and responsibilities of the parties and the validity of the of the Shareholder Agreement referenced herein;

2. For costs of suit herein incurred;

3. For such other and further relief as the court deems just and proper.

DATED: June 23, 2003

HIGGS, FLETCHER & MACK LLP

By: [signature]
JAMES M. PETERSON, ESQ.
PHILLIP C. SAMOURIS, ESQ.
ALEXIS S. GUTIERREZ, ESQ.
Attorneys for Defendants
DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999, and DC SHOES EMPLOYEE SHARE TRUST

_______TRACK_____EXHIBIT______
DATE________________________
WITNESS: ____________________
____________________PAGE(S)
LAURA TAYLOR MARTIN CSR NO. 4156

Exhibit 3

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release, dated August 20, 2003 (this "Agreement"), is entered into by and among DC Shoes, Inc., a California corporation ("DC Shoes"), Kenneth Block, an individual ("Block"), Damon Way, an individual ("Way"), the Damon Way Revocable Trust u/a May 20, 1999 (the "Way Trust"), DC Shoes Employee Share Trust (the "DC Trust" and together with DC Shoes, Block, Way and the Way Trust, the "DC Parties"), FDC Investments, Inc., a California corporation ("FDC"), Clayton D. Blehm, an individual ("Blehm"), and Clayton Blehm Living Trust 1997 (the "Blehm Trust" and together with FDC and Blehm, the "FDC Parties")(collectively sometimes referred to herein as the "Parties").

RECITALS

A. The FDC Parties are the plaintiffs and the DC Parties, together with Billabong International Limited, a corporation ("Billabong"), are the defendants in a proceeding (Case No. GIN024468) (together with the related cross-action, the "Employment Litigation") before the Superior Court of the State of California, County of San Diego, North County Branch (the "Court"). The Parties desire to dismiss the Employment Litigation, without prejudice, in accordance with the terms and conditions contained herein. In the event that Billabong executes that certain Settlement Agreement and Release, of even date herewith (the "Billabong Settlement Agreement"), by and among the FDC Parties and Billabong, on or before August 27, 2003, Billabong will also be dismissed as a party to the Employment Litigation.

B. FDC is the plaintiff and the DC Parties are the defendants in a proceeding (Case No. GIN028361) before the Court, and the Parties desire to dismiss the Dissolution Litigation, without prejudice, in accordance with the terms and conditions contained herein.

C. In the Employment Litigation, Blehm sought to recover, among other things, damages for the alleged wrongful termination of his employment with DC Shoes by the actions of Block, Way and Billabong in violation of public policy (age discrimination). In their related cross-action, the DC Parties sought, among other things, to rescind the issuance of DC Shoes' stock to FDC because FDC allegedly obtained the stock through fraud. In the Dissolution Litigation, Blehm sought to dissolve DC based on the alleged mismanagement of DC by Block and Way since Blehm's termination.

D. The Parties, although denying any wrongdoing on their parts, recognize the costs and risks inherent in litigation, and have determined the better course is to settle their disputes on the terms contained. DC Shoes has therefore agreed to pay Blehm $10,500,000 in exchange for the FDC Parties' agreement to dismiss the Employment Litigation against them and Billabong and the Dissolution Litigation, and FDC has agreed to sell its minority interest in the stock of DC Shoes to DC Shoes for $4,500,000 (the "Purchase Price") in exchange for the DC Parties' agreement to dismiss their cross-action in the Employment Litigation.

E. The Parties acknowledge that the Purchase Price takes into account the potential adverse effects of the cloud on title created by the cross-action, the Dissolution Litigation, the minority character of FDC's interest represented by the Shares, and the fact there is no ready market for the Shares.

F. The Parties mutually desire to settle fully and finally all obligations and claims between them in accordance with and pursuant to the terms and conditions of this Agreement and to end their relationship as amicably as possible and eliminate the possibility of any future disputes.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree hereby as follows:

1. Filing of Stipulations. On August 28, 2003, if this Agreement has not been revoked as provided for in Section 8 of this Agreement, and following the execution and delivery of this Agreement and the Billabong Settlement Agreement (if Billabong executes the Billabong Settlement Agreement on or before August 27, 2003), the Parties shall file with the Court a Stipulation Re Conditional Dismissal Pending Settlement, in substantially the form attached hereto as Exhibit A, petitioning the Court to dismiss, without prejudice, the Employment Litigation (the "Employment Stipulation"). If Billabong does not execute the Billabong Settlement Agreement on or before August 27, 2003, the Stipulation re Conditional Dismissal Pending Settlement shall be amended to delete Billabong. On August 28, 2003, if this Agreement has not been revoked as provided for in Sections 8 of this Agreement, the Parties shall file with the Court a Stipulation Re Conditional Dismissal Pending Settlement, in substantially the form attached hereto as Exhibit B, petitioning the Court to dismiss, without prejudice, the Dissolution Litigation (the "Dissolution Stipulation").

2. Purchase and Sale of DC Shoes Stock. As part of the settlement between the FDC Parties and the DC Parties set forth herein, FDC will sell and DC Shoes will purchase all of the shares of DC Shoes common stock currently held by FDC (the "Shares"). Concurrently with the execution and delivery of this Agreement, DC Shoes and FDC shall enter into a securities purchase agreement, in substantially the form attached hereto as Exhibit C (the "Securities Purchase Agreement"), pursuant to which FDC agrees to sell and DC Shoes agrees to purchase the Shares.

3. Resignation of Blehm. Blehm hereby resigns his position as a director of DC Shoes, effective upon DC Shoes' delivery of the Consideration (as defined below), subject to being reinstated as a director in the event of an uncured default in the Settlement Promissory Note or in the Purchase Promissory Note.

4. Repayment Obligation. Upon the satisfaction or waiver of each of the conditions set forth in Section 9 hereof, DC Shoes shall forgive, in its entirety, Blehm's obligation to repay (i) $500,000, plus all accrued and unpaid interest thereon, (ii) any use of the DC Shoes credit cards to charge alleged personal, alleged non-business items, or alleged unsubstantiated business expenses, plus all accrued and compound interest thereon to DC Shoes (the "Repayment Obligation"), and at all times thereafter, DC Shoes shall deem the Repayment Obligation to be satisfied in full.

5. IRS Claim. Subject to the satisfaction or waiver of each of the conditions set forth in Section 9 hereof, DC Shoes shall acknowledge and agree that (i) the claim made by the Internal Revenue Service for unpaid taxes relating to Blehm's prior employment with DC Shoes, in the approximate amount of $1,800,000, plus all applicable interest and penalties (the "IRS Claim") is

the sole responsibility of DC Shoes, and (ii) none of the FDC Parties shall have any liability or obligation to DC Shoes in connection with the IRS Claim.

6. Mutual Release.

6.1 Subject to the conditions set forth in Section 9 below, each of the FDC Parties, on its own behalf and on behalf of its past, present and future successors, assigns, agents, representatives and attorneys, agrees to completely release and forever discharge each of the DC Parties from any and all claims, rights, demands, actions, obligations, liabilities, and causes of action of any and every kind, nature, and character whatsoever, known or unknown, arising from or relating to the Employment Litigation and the Dissolution Litigation ("FDC Claims"), including, without limitation, (i) claims arising from Blehm's prior employment by DC Shoes and termination thereof ($2,000,000), (ii) claims under applicable state and federal discrimination laws ($7,500,000), (iii) claims relating to the equal compensation agreement between the FDC Parties and the DC Parties ($500,000); and (iv) any other claims that the FDC Parties may have against the DC Parties as of the date of this Agreement ($500,000); in each case, whether based on tort, contract (express or implied), or any federal, state or local law, statute or regulation; excluding all matters related to Boss Corporation, a Korean corporation; provided, however, that this Agreement does not release or discharge the DC Parties from their obligations under this Agreement.

6.2 Without limiting, in any way, the scope of the releases granted herein, each of the FDC Parties certifies that this Agreement constitutes a knowing and voluntary waiver of any and all rights or claims that exist or that either may have or may claim to have under the Age Discrimination in Employment Act (the "ADEA"), as amended by the Older Workers Benefit Protection Act of 1990 (the "OWBPA"), which is set forth at 29 U.S.C. §§621, et seq. (the "Age Claim Release"). Each of the FDC Parties further acknowledges and agrees that the releases granted by it herein extend to any and all claims including, but not limited to, any alleged (a) violation of the National Labor Relations Act, Title VII of the Civil Rights Act, the Americans With Disabilities Act of 1990, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Consolidated Omnibus Budget Reconciliation Act of 1985; (b) discrimination on the basis of national origin, sex, race, religion, age, disability, marital status, breach of any express or implied employment contract or agreement, wrongful discharge, breach of the implied covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, fraud, misrepresentation, defamation, interference with prospective economic advantage, failure to pay wages due or other monies owed; and (c) any other violation of any local, state or federal law, regulation or ordinance and/or public policy, contract, or tort or common law claim having any bearing whatsoever on the terms and conditions and/or cessation of employment with DC Shoes, including, but not limited to, any allegations for costs, fees, or other expenses, including attorneys' fees, incurred in any of these matters, which the FDC Parties ever had, now has, or may have as of the date hereof.

6.3 Subject to the conditions set forth in Section 9 below, each of the DC Parties, on its own behalf and on behalf of its past, present and future successors, assigns, agents, representatives and attorneys, agrees to completely release and forever discharge each of the FDC Parties from any and all claims, rights, demands, actions, obligations, liabilities, and causes of action of any and every kind, nature, and character whatsoever, known or unknown, arising from or relating to the Employment Litigation and the Dissolution Litigation ("DC Claims"), including, without limitation, (i) all claims related to Blehm's prior employment by DC Shoes, including, without limitation, the IRS Claim, (ii) all claims related to Blehm's position as a director and/or officer of DC Shoes, (iii) all claims related to the Repayment Obligation, and (iv) any and all claims related to any alleged misappropriation or misuse of the corporate funds of DC Shoes; (v) claims relating to the equal compensation agreement between the FDC Parties and the DC Parties; (vi) any other claims that the DC Parties may have against the FDC Parties as of the date of this Agreement; excluding all matters related to Boss Corporation, a Korean corporation; provided, however, that this Agreement does not release or discharge the FDC Parties from their obligations under this Agreement.

6.4 Subject to the conditions set forth in Section 9, below, it is understood and agreed that the releases contained in this Section 6 are full and final releases covering all FDC Claims and all DC Claims, except as set forth in the provisos in Sections 6.1 and 6.3, respectively. Therefore, each party hereby waives any and all rights or benefits which it may now have, or in the future may have, under the terms of Section 1542 of the California Civil Code, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Each party expressly waives and relinquishes any rights it may have under Civil Code 1542 or any other federal, state or local statute or common law principle with a similar effect.

6.5 The parties acknowledge that they or their attorney or agent may hereafter discover claims or facts in addition to or different from those which they now know or believe to exist with respect to the FDC Claims or the DC Claims, but that it is their intention hereby fully, finally, and forever to settle and release all of the FDC Claims and the DC Claims, except as set forth in the provisos in Sections 6.1 and 6.3, respectively. In furtherance of their intention, the releases herein given shall be and remain in effect as full and complete releases notwithstanding the discovery or existence of any such additional or different claim or fact.

6.6 Each party represents and warrants to the other that such party has not heretofore assigned, transferred or granted, or purported to assign, transfer or grant, any of the claims, demands and causes of action disposed of by this Section 6. Each party agrees that such party shall not (i) institute a lawsuit, arbitration or other legal proceeding based upon, arising out of, or relating to any of the claims, demands and causes of action disposed of by this Section 6, (ii) participate, assist, or cooperate in any such proceeding, unless and to the extent required or compelled by law, or (iii) encourage, assist and/or solicit any third party to institute any such proceeding.

7. Consideration for Releases.

7.1 Cash Consideration. In consideration of the releases granted herein by the FDC Parties, DC Shoes shall pay to Blehm an amount equal to Ten Million Five Hundred Thousand Dollars ($10,500,000) (the "Consideration"). The Consideration shall be paid to Blehm concurrently with the execution and delivery of this Agreement by delivery to Blehm of a promissory note, in substantially the form attached hereto as Exhibit D (the "Settlement Promissory Note"), in the principal amount of $9,500,000 and a check for $1,000,000.

7.2 Security. Concurrently with the execution and delivery of this Agreement, DC Shoes, Blehm and FDC shall enter into an escrow agreement, in substantially the form attached hereto as Exhibit F (the "Escrow Agreement"), pursuant to which Higgs, Fletcher & Mack LLP will hold the shares in escrow until the obligations of DC Shoes under each of the Settlement Promissory Note and the Purchase Promissory Note (as defined in the Securities Purchase Agreement) are satisfied in full or there is an Event of Default as defined in either or both the Settlement Promissory Note and the Purchase Promissory Note.

8. Revocability of this Agreement. Applicable law requires that Blehm be advised, and DC Shoes hereby advises Blehm, to consult with an attorney and discuss the Age Claim Release. Blehm hereby acknowledges that he has consulted with an attorney and that DC Shoes has provided to Blehm at least 21 days within which to review and consider the Age Claim Release before executing this Agreement. Blehm understands that he may revoke this Agreement for up to seven calendar days following the execution and delivery of this Agreement (the "Revocation Period") and that this Agreement shall not become effective or enforceable until the Revocation Period has expired. Blehm agrees that such revocation must be in writing and received by Brian Wright of DC Shoes at the address set forth in Section 9.1 of the Securities Purchase Agreement not later than midnight on the seventh day following the execution and delivery of this Agreement by Blehm. If Blehm revokes this Agreement as provided in this Section 7, this Agreement shall no longer be effective or enforceable. Richard L. Kintz of Sheppard Mullin shall hold the $1,000,000 check described in Section 7.1 until the eighth day after the Closing and if he has not received written notice from Brian Wright of the rescission of this Agreement by 3:00 p.m. Pacific Standard Time on August 28, 2003, he shall be authorized to forward the $1,000,000 check to Clayton Blehm.

9. Effectiveness of Releases. The effectiveness and enforceability of the releases granted herein by the FDC Parties and the DC Parties are subject to the satisfaction of each of the following conditions:

(a) Each of the Employment Stipulation and Dissolution Stipulation shall have been filed with the Court, and the Court shall have ordered the dismissal, without prejudice, of each of the Employment Litigation and the Dissolution Litigation;

(b) Blehm shall have resigned as a director of DC Shoes;

(c) Blehm shall not have exercised his right to revoke the Age Claim Release as provided in Section 8 above, and the Revocation Period shall have expired;

(d) all amounts due and payable to Blehm under the Settlement Promissory Note shall have been paid in full in accordance with the terms and conditions contained therein;

(e) DC Shoes and FDC shall have entered into the Securities Purchase Agreement and the closing of the transactions contemplated thereby shall have occurred; and

(f) all amounts due and payable to FDC under the Purchase Promissory Note to be issued by DC Shoes in connection with the Securities Purchase Agreement, in the principal amount of $4,500,000, shall have been paid in full in accordance with the terms and conditions contained in such promissory note.

If the Releases do not become effective due to a failure of one or more of the conditions set forth above in this Section 9, then this Agreement shall be of no further force and effect and the litigation described in Paragraph 1 hereof may be reinstated by the respective parties. None of the money paid pursuant to the Securities Purchase Agreement or this Agreement or the Purchase Promissory Note or the Settlement Promissory Note will need to be returned to DC Shoes, Inc., but instead may be retained by Blehm and FDC, respectively.

10. No Admission. Nothing contained in this Agreement shall be construed as an admission by any party of any liability of any kind to any other party. Each party acknowledges that each other party expressly denies any liability or obligation to any other party.

11. Confidentiality. Each of the FDC Parties, DC Parties and Billabong, on its own behalf and on behalf of its directors, officers, employees, agents, representatives and affiliates (collectively, "Representatives"), hereby agrees that the terms and conditions of this Agreement are to remain confidential, and shall not be disclosed, discussed or revealed to any other person or entity except under a similar obligation of confidentiality or as required by law. In the event any of the FDC Parties or DC Parties or any of their Representatives is questioned about the Employment Litigation or the Dissolution Litigation, such parties shall indicate only that, "the matter has been resolved," and refuse to discuss such matters any further. Notwithstanding the foregoing provisions of this Section 11, DC Shoes may issue a press release following the execution and delivery of this Agreement in the form attached hereto as Exhibit G. In addition, notwithstanding the foregoing provisions of this Section 11 or any other provision of this Agreement or any other agreement to which the parties to this Agreement are parties or by which they are bound (collectively "Agreements"), with respect to any or all of the transactions contemplated by the Agreements (individually and collectively the "Transactions"), (i) any obligations of confidentiality contained in this Section 11 or any other provision of the Agreements, as they relate to any Transactions, shall not apply to the tax structure or tax treatment of the Transactions, and each party to the Agreements (and any employee, representative or agent of any party to the Agreements) may disclose to any and all persons, without limitation of any kind, the tax structure and tax treatment of the Transactions and all materials of any kind (including opinions or other tax analyses) that are provided to such party relating to such tax treatment and tax structure, and (ii) the Agreements shall not limit in any way at any time the ability of any party to the Agreements (or any employee, representative or agent of any party to the Agreements) to consult any tax advisor (including a tax advisor independent from all other entities involved in the Transactions) regarding the tax treatment or tax structure of the Transactions. The immediately preceding sentence is intended to cause the Transactions to be treated as not having been offered under conditions of confidentiality for purposes of Section 1.6011-4(b)(3) of the Treasury Regulations promulgated under Section 6011 of the Internal Revenue Code of 1986, as amended, or any successor provision, and any similar provisions of state, local or foreign law now or hereafter in effect (individually and collectively the "Permitted Disclosure Rule"), and shall be construed in a manner consistent with the purposes of the Permitted Disclosure Rule; provided that, (i) consistent with the Permitted Disclosure Rule, no party to the Agreements (nor any employee, representative or agent thereof) may disclose any information to the extent such disclosure could result in a violation of any federal or state securities law; and (ii)

the immediately preceding sentence shall not apply to the extent disclosure to a person other than the United States Internal Revenue Service or a corresponding state tax authority would result in a violation of other applicable law (including without limitation privacy rights of employees and other persons). In addition, each party to the Agreements acknowledges that it has no proprietary or exclusive rights to the federal tax structure of the Transactions or any federal tax matter or federal tax idea related to the Transactions.

12. Satisfaction of Conditions. Upon performance of the Parties' obligations hereunder including, but not limited to payment of the Consideration (Paragraph 7.1), Purchase and Sale of the DC Shoes Stock (Paragraph 2), Resignation of Blehm (Paragraph 3), forgiveness of debt (Paragraph 4) and execution of the Releases, the Parties shall cooperate in the filing of dismissals of the Employment Litigation and Dissolution Litigation, with prejudice.

13. Remedies in the Event of Default Under the Settlement Promissory Note.

13.1 Remedies. The remedies of the holder of the Settlement Promissory Note in the Event of a Default thereunder are as follows:

(a) Retain all payments that have been made under the Settlement Promissory Note;

(b) Reacquire the Shares from the Escrow Agent;

(c) Reinstitute the litigation described in Section 1 of the Settlement Agreement; and

(d) Reinstated as a member of the DC Board of Directors at his option.

The remedies hereunder are cumulative.

13.2 No Right to Sue under the Settlement Promissory Note. The Seller does not have the right to sue the Company under the Settlement Promissory Note in the Event of Default for other than interest or late payment charges that accrued up to the time of the Event of Default.

14. Right of DC Parties and FDC Parties with Respect to the Shares.

14.1 Right to Vote. The Seller hereby grants to Ken Block and Damon Way the right to represent the Shares at any annual or special meeting of the shareholders and to vote such Shares or give its written consent to the voting of such Shares, unless and until such time as Ken Block and Damon Way receive written notice from the Seller of the occurrence of an Event of Default as such term is defined in the Settlement Promissory Note and /or in the Purchase Promissory Note. Upon the receipt of notice of an event of default, the voting rights shall be returned to the Seller who hereby appoints Blehm to vote such Shares. Seller shall deliver two proxies, one to Ken Block to vote 1,500,000 Shares and one proxy to Damon Way to vote 1,500,000 Shares of the Settlement Agreement has not been rescinded by midnight August 28, 2003.

14.2 Resignation from the Board of Directors. Upon the Closing Date, the Seller shall cause Blehm to resign from his position as a member of the board of directors of Purchaser unless and until the occurrence of an Event of Default, at which time he shall again become a member of the board of directors at his option. This resignation shall be delivered to Seller on August 28, 2003 if the Settlement Agreement has not been rescinded.

14.3 Shareholders Agreement Dated January 1, 1999. Block, Way and the Way Trust consent to the transactions authorized in the Securities Purchase Agreement and the Settlement Agreement. Seller agrees that the Shareholders Agreement dated January 1, 1999 shall no longer be effective and shall terminate when the conditions set forth in Section 9 of the Settlement Agreement are all satisfied.

15. Miscellaneous.

15.1 Governing Law. This Agreement shall be governed by and construed in accordance with the internal laws of the State of California (irrespective of its choice of law principles).

15.2 Entire Agreement. This Agreement and the Operative Agreements (as defined in the Securities Purchase Agreement) constitute the entire agreement between the parties hereto and supersede all prior agreements between such parties. Each of the parties hereto acknowledges that no representations, inducements, promises, agreements, or warranties, oral or otherwise, have been made by it, or anyone acting on its behalf, which are not embodied in this Agreement or the Operative Agreements, and that it has not executed this Agreement in reliance upon any such representation, inducement, promise, agreement, or warranty not contained in this Agreement or the Operative Agreements.

15.3 Severability. If any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void, or unenforceable, the remainder of this Agreement and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto.

15.4 Successors. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective heirs, legal representatives, successors, and permitted assigns.

15.5 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other parties, it being understood that all parties need not sign the same counterpart.

15.6 Attorneys' Fees. Should suit be brought to enforce or interpret any part of this Agreement, the prevailing party will be entitled to recover, as an element of the costs of suit and not as damages, reasonable attorneys' fees to be fixed by the court (including, without limitation, costs, expenses and fees on any appeal).

15.7 Consultation with Counsel. Each of the parties to this Agreement acknowledges and agrees that it fully understands its right to discuss all aspects of this Agreement with a private attorney, and that to the extent, if any, it has desired, it has availed itself of this right, that it has carefully read and fully understands all of the provisions of this Agreement, and that it is voluntarily entering into this Agreement.

15.8 Further Assurances. Each of the parties to this Agreement shall execute such documents and other papers and take such further actions as may be reasonably required or desirable to carry out the provisions hereof and the transactions contemplated hereby.

15.9 No Strict Construction. The language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rules of strict construction will be applied against either party.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date first above written.

FDC PARTIES:

FDC INVESTMENTS, INC., a California corporation

By: ______________________________
Printed Name:
Title:
Dated:

____
Clayton D. Blehm, an individual (date)

CLAYTON BLEHM LIVING TRUST 1997

By: ______________________________
Printed Name:
Title:
Dated:

DC PARTIES:

DC SHOES, INC., a California corporation

By: ______________________________
Printed Name: Brian Sellstrom
Title: CEO
Dated: 8/20/03

____
Kenneth Block, an individual (date)

____
Damon Way, an individual (date)

DAMON WAY REVOCABLE TRUST U/A MAY 20, 1999

By: ______________________________
Printed Name:
Title:
Dated:

DC SHOES EMPLOYEE SHARE TRUST

By: ______________________________
Printed Name:
Title:
Dated:

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date first above written.

FDC PARTIES:

FDC INVESTMENTS, INC., a California corporation

By: [signature]
Printed Name: Clayton D. Blehm
Title: President
Dated: August 20, 2003

[signature] 8/20/03
Clayton D. Blehm, an individual (date)

CLAYTON BLEHM LIVING TRUST 1997

By: [signature]
Printed Name: Clayton D. Blehm
Title: Trustee
Dated: August 20, 2003

DC PARTIES:

DC SHOES, INC., a California corporation

By: ______________________
Printed Name:
Title:
Dated:

____
Kenneth Block, an individual (date)

____
Damon Way, an individual (date)

DAMON WAY REVOCABLE TRUST U/A MAY 20, 1999

By: ______________________
Printed Name:
Title:
Dated:

DC SHOES EMPLOYEE SHARE TRUST

By: ______________________
Printed Name:
Title:
Dated:

EXHIBIT A

Employment Stipulation

EXHIBIT B

Dissolution Stipulation

EXHIBIT C

Securities Purchase Agreement

EXHIBIT D

Settlement Promissory Note

EXHIBIT F

Escrow Agreement

EXHIBIT G

Press Release

Exhibit 4

ORIGINAL

10/30/0 San Diego Zero

ATTY. RECORDED SERVICE CAL. STAT. S.T. JUDGE FILES

UNITED STATES TAX COURT

DC SHOES, INC. F/K/A/ CIRCUS DISTRIBUTION, INC., Petitioner,	)	
v.	)	Docket No. 11574-02
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	EMPLOYMENT

DECISION

Pursuant to agreement of the parties in this case, it is

ORDERED AND DECIDED: That Clayton Blehm, whose taxpayer identification number is 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, is classified as an employee of the petitioner for purposes of federal employment taxes under Subtitle C of the Internal Revenue Code with respect to the quarters ending March 31, 1998 through and including December 31, 2000;

That with respect to Clayton Blehm, whose taxpayer identification number is 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, the petitioner is not entitled to treatment under section 530 of the Revenue Act of 1978, as amended, for the quarters ended March 31, 1998 through and including December 31, 2000; and

CERTIFIED TRUE COPY
ROBERT R. DI TROLIO, CLERK
BY: a Sargent
DEPUTY CLERK

Court's Ex. 211-1
Case # GIN054897
Rec'd
Dept. Clk.

SERVED SEP 30 2003

That the proper amounts of employment tax, additions to tax, and penalties under the above determination are as shown below:

Period Ended	Tax	Amount of Tax	Additions to Tax/Penalties I.R.C. §§ 6656	6662
March 31, 1998	FICA	$ 4,818.37	$ 240.92	$ 963.68
March 31, 1998	ITW	$ 5,232.51	--	$1,046.50
June 30, 1998	FICA	$ 5,569.82	$ 278.49	$1,113.96
June 30, 1998	ITW	$ 5,433.69	--	$1,086.74
September 30, 1998	FICA	$ 4,613.79	$ 230.69	$ 922.76
September 30, 1998	ITW	$ 5,168.40	--	$1,033.68
December 31, 1998	FICA	$ 5,163.66	$ 258.18	$1,032.73
December 31, 1998	ITW	$ 5,192.76	--	$1,038.55
March 31, 1999	FICA	$ 7,023.25	$ 351.16	$1,404.65
March 31, 1999	ITW	$ 7,638.45	--	$1,527.69
June 30, 1999	FICA	$ 9,436.57	$ 471.83	$1,887.31
June 30, 1999	ITW	$ 8,267.28	--	$1,653.46
September 30, 1999	FICA	$ 6,059.53	$ 302.98	$1,211.91
September 30, 1999	ITW	$ 8,061.27	--	$1,612.25
December 31, 1999	FICA	$ 5,625.66	$ 281.28	$1,125.13
December 31, 1999	ITW	$ 8,313.78	--	$1,662.76
December 31, 1999	FUTA	$ 434.00	$ 43.40	$ 86.80
March 31, 2000	FICA	$10,257.22	$ 512.86	$2,051.44
March 31, 2000	ITW	$11,928.09	--	$2,385.62
June 30, 2000	FICA	$11.316.14	$ 565.81	$2,263.23
June 30, 2000	ITW	$12,226.65	--	$2,445.33
September 30, 2000	FICA	$10,548.60	$ 527.43	$2,109.72
September 30, 2000	ITW	$13,541.52	--	$2,708.30
December 31, 2000	FICA	$ 9,631.23	$ 481.56	$1,926.25
December 31, 2000	ITW	$14,233.35	--	$2,846.67
December 31, 2000	FUTA	$ 434.00	$ 43.40	$ 86.80

David Laro

Judge.

Entered: SEP 3 0

* * * * *

It is stipulated that the amounts of tax, additions to tax, and penalties listed above are due and owing.

It is further stipulated that the term "federal employment taxes" refers to income tax withholding (ITW) under I.R.C. 3402(a), the tax imposed by the Federal Insurance Contributions Act (FICA) under I.R.C. §§ 3101, 3102(a), and 3111, and the tax imposed by the Federal Unemployment Tax Act (FUTA) under I.R.C. § 3301(a).

It is further stipulated that the Court may enter the foregoing decision.

It is further stipulated that interest will be assessed as provided by law on the tax due from the petitioner.

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner waives the restrictions contained in I.R.C. § 6213(a) prohibiting assessment and collection of the tax (plus statutory interest) until the decision of the Tax Court becomes final.

EMILY A. PARKER
Acting Chief Counsel
Internal Revenue Service

J. Clancy Wilson 9/15/03
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SEP 23 2003

Exhibit 5

LEXSTAT IRC 3509

INTERNAL REVENUE CODE
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*** CURRENT THROUGH P.L. 110-260, APPROVED 7/1/2008 ***

INTERNAL REVENUE CODE
SUBTITLE C. EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX
CHAPTER 25. GENERAL PROVISIONS RELATING TO EMPLOYMENT TAXES AND COLLECTION OF INCOME TAXES AT SOURCE

IRC Sec. 3509

§ 3509. Determination of employer's liability for certain employment taxes.

(a) In general. If any employer fails to deduct and withhold any tax under chapter 24 or subchapter A of chapter 21 [IRC Sections 3401 et seq. or 3101 et seq.] with respect to any employee by reason of treating such employee as not being an employee for purposes of such chapter or subchapter, the amount of the employer's liability for--
(1) Withholding taxes. Tax under chapter 24 [IRC Sections 3401 et seq.] for such year with respect to such employee shall be determined as if the amount required to be deducted and withheld were equal to 1.5 percent of the wages (as defined in section 3401 [IRC Sec. 3401]) paid to such employee.
(2) Employee social security tax. Taxes under subchapter A of chapter 21 [IRC Sections 3101 et seq.] with respect to such employee shall be determined as if the taxes imposed under such subchapter were 20 percent of the amount imposed under such subchapter without regard to this subparagraph.

(b) Employer's liability increased where employer disregards reporting requirements.
(1) In general. In the case of an employer who fails to meet the applicable requirements of section 6041(a), 6041A, or 6051 [IRC Sec. 6041(a), 6041A, or 6051] with respect to any employee, unless such failure is due to reasonable cause and not willful neglect, subsection (a) shall be applied with respect to such employee
(A) by substituting '3 percent' for '1.5 percent' in paragraph (1); and
(B) by substituting '40 percent' for '20 percent' in paragraph (2).
(2) Applicable requirements. For purposes of paragraph (1), the term 'applicable requirements' means the requirements described in paragraph (1) which would be applicable consistent with the employer's treatment of the employee as not being an employee for purposes of chapter 24 or subchapter A of chapter 21 [IRC Sections 3401 et seq. or 3101 et seq.].

(c) Section not to apply in cases of intentional disregard. This section shall not apply to the determination of the employer's liability for tax under chapter 24 or subchapter A of chapter 21 [IRC Sections 3401 et seq. or 3101 et seq.] if such liability is due to the employer's intentional disregard of the requirement to deduct and withhold such tax.

(d) Special rules. For purposes of this section--
(1) Determination of liability. If the amount of any liability for tax is determined under this section--
(A) the employee's liability for tax shall not be affected by the assessment or collection of the tax so determined,
(B) the employer shall not be entitled to recover from the employee any tax so determined, and
(C) sections 3402(d) [IRC Sec. 3402(d)] and section 6521 [IRC Sec. 6521] shall not apply.
(2) Section not to apply where employer deducts wage but not social security taxes. This section shall not apply to any employer with respect to any wages if--

(A) the employer deducted and withheld any amount of the tax imposed by chapter 24 [IRC Sections 3401 et seq.] on such wages, but

(B) failed to deduct and withhold the amount of the tax imposed by subchapter A of chapter 21 [IRC Sections 3101 et seq.] with respect to such wages.

(3) Section not to apply to certain statutory employees. This section shall not apply to any tax under subchapter A of chapter 21 [IRC Sections 3101 et seq.] with respect to an individual described in subsection (d)(3) of section 3121 [IRC Sec. 3121] (without regard to whether such individual is described in paragraph (1) or (2) of such subsection).

HISTORY:

(Added Sept. 3, 1982, P.L. 97-248, Title II, § 270(a), 96 Stat. 553; Nov. 10, 1988, P.L. 100-647, Title II, § 2003(d), 102 Stat. 3598; Nov. 5, 1990, P.L. 101-508, Title V, § 5130(a)(4), 104 Stat. 1388-289.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

In 1990, P.L. 101-508, Sec. 5130(a)(4), substituted 'subsection (d)(3)' for 'subsection (d)(4)' in para. (d)(3), effective for remuneration for agricultural labor paid after 12/31/87.

In 1988, P.L. 100-647, Sec. 2003(d), substituted 'subsection (d)(4)' for 'subsection (d)(3)' in para. (d)(3), effective for remuneration for agricultural labor paid after 12/31/87.

In 1982, P.L. 97-248, Sec. 270(a), added Code Sec. 3509, effective 9/3/82, except for assessments made before 1/1/83.

NOTES:

Research Guide:

Am Jur:
35 Am Jur 2d, Federal Tax Enforcement § 163.
33A Am Jur 2d, Federal Taxation (2008) § 9503.
34 Am Jur 2d, Federal Taxation (2008) § 71658.

Bankruptcy:
4 Collier on Bankruptcy (Matthew Bender 15th ed. rev), ch 507, Priorities P 507.10.
2 Collier Bankruptcy Manual, ch 507, Priorities P 507.10.

Exhibit 6

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Attorneys for plaintiffs
CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC

05 JUL 14 PM 2:54

BY: DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation;

Plaintiffs,

vs.

DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT, an individual; and DOES 1 through 10, inclusive,

Defendants.

Case No. '05 CV 1418 JAH (WMc)

COMPLAINT FOR VIOLATION OF SECURITIES AND EXCHANGE ACT OF 1934 (§10(b) and Rule 10b-5), BREACH OF FIDUCIARY DUTY, INTENTIONAL CONCEALMENT, NEGLIGENT FAILURE TO DISCLOSE, INJUNCTIVE RELIEF, SPECIFIC PERFORMANCE, BREACH OF WRITTEN CONTRACT, INTENTIONAL MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, RESCISSION, UNJUST ENRICHMENT, AND DEMAND FOR JURY TRIAL

COPY

Plaintiffs, CLAYTON D. BLEHM ("Blehm"), CLAYTON BLEHM LIVING TRUST 1997 ("Blehm Trust"), and FDC INVESTMENTS, INC. ("FDC") (Blehm, Blehm Trust, and FDC are collectively referred to herein as "the Blehm Parties") allege:

PRELIMINARY STATEMENT

1. The Blehm Parties are entitled to relief under the Securities and Exchange Act of 1934 §10(b) and Rule 10b-5, as well as 15 U.S.C. §78t, 15 U.S.C. §78t-1, and 17 C.F.R. §240.10b-5 due to defendants' failure to disclose material non-public information to the Blehm Parties in connection with the acquisition of corporate stock from the Blehm Parties.

JURISDICTION AND VENUE

2. This Court has exclusive jurisdiction over the Securities and Exchange Act claims set forth below by virtue of 15 U.S.C. § 78aa and 28 U.S.C. §1331, and the Court has jurisdiction over the other claims set forth below by virtue of pendant jurisdiction pursuant to 28 U.S.C. §1367..

3. Venue is proper in this district under 28 U.S.C. §1391(b) and (c) because a substantial part of the events occurred in this district and the defendants are doing business and reside in this district.

GENERAL ALLEGATIONS

4. Blehm is, and at all times mentioned herein was, an individual residing and conducting business in San Diego County, California.

5. Blehm Trust is, and at all times mentioned herein was, a living trust created under the laws of the State of California. Blehm is, and at all times mentioned herein was, a trustee of Blehm Trust.

6. FDC is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in San Diego County, California. Blehm is, and at all times mentioned herein, was the chief executive officer of FDC. Blehm Trust is, and at all times mentioned herein was, the sole shareholder of FDC.

7. Defendant DC SHOES, INC. ("DC") is, and at all times mentioned herein was, a privately held corporation organized and existing under the laws of the State of California with its principal place of business located in San Diego County, California. At all times mentioned herein, DC was in the business of designing, manufacturing, and selling sports footwear, apparel, and related goods.

8. Defendant KENNETH BLOCK ("Block") is, and at all times mentioned herein was, an individual residing and working in San Diego County, California. At all times mentioned herein, Block was an officer, director, and shareholder of DC.

9. Defendant DAMON WAY ("Way") is, and at all times mentioned herein was, an individual, residing and working in San Diego County, California. At all times mentioned herein, Way was an officer and director of DC.

10. The Blehm Parties are informed and believe, and based upon their information and belief allege, that defendant THE DAMON WAY REVOCABLE LIVING TRUST U/A DATED MAY 20, 1999 ("Way Trust") is, and at all times mentioned herein was, a living trust created under the laws of the State of California. The Blehm Parties are informed and believe, and based upon their information and belief allege, that at all times mentioned herein, Way was a trustee of Way Trust. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that at all times mentioned herein, Way Trust was a shareholder of DC.

11. The Blehm Parties are informed and believe, and based upon their information and belief allege, that defendant DC SHOES EMPLOYEE SHARE TRUST ("DC Trust") is, and at all times mentioned herein was, an employee share trust created under the laws of the State of California and the laws of the United States. The Blehm Parties are informed and believe, and based upon their information and belief allege, that at all times prior to March 8, 2004, DC Trust was a shareholder of DC. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that at all times prior to March 8, 2004, Block and Way were trustees of DC Trust.

12. Defendant BRIAN WRIGHT ("Wright") is, and at all times mentioned herein was, an individual residing and working in San Diego County, California. At all times mentioned herein, Wright was an officer of DC, its general counsel, and a shareholder of DC by virtue of his participation in DC Trust.

13. The events giving rise to this action occurred in San Diego County, California. The causes of action set forth herein are money demands in excess of the jurisdictional minimum of this court.

14. The true names and capacities of defendants sued herein as Does 1 through 10, inclusive, are unknown to the Blehm Parties, and the Blehm Parties therefore sue those defendants by such fictitious names. The Blehm Parties will amend this complaint to allege their true names and capacities when ascertained. The Blehm Parties are informed and believe and thereon allege that each of the fictitiously named defendants is responsible for the injuries suffered by the Blehm Parties as hereinafter alleged.

15. The Blehm Parties are informed and believe, and based upon their information and belief allege, that at all times mentioned herein each of the defendants was the agent and employee of each of the remaining defendants and, in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.

16. The Blehm Parties are informed and believe, and based on their information and belief allege, that DOES 1 through 10, inclusive, are the alter egos of DC. The Blehm Parties are informed and believe, and based on their information and belief allege, that there exists a unity of interest and ownership between DOES 1 through 10, inclusive, and DC such that the individuality and separateness of DC has ceased. The Blehm Parties are informed and believe, and based on their information and belief allege, that DC is now a mere shell, instrumentality, and conduit through which DOES 1 through 10, inclusive, are conducting business. The Blehm Parties are informed and believe, and based on their information and belief allege, that the assets of DC have been commingled with the assets of DOES 1 through 10, inclusive. The Blehm Parties are further informed and believe, and based on their further information and belief allege, that to recognize DC as a separate entity would sanction a fraud or promote injustice because

DOES 1 through 10, inclusive, have diverted the income, revenue, and profits of DC to themselves.

17. Blehm is the former Chief Financial Officer and a former corporate director of DC. Blehm's employment with DC was terminated on June 30, 2002. The termination of Blehm's employment gave rise to a lawsuit entitled Blehm, et. al. v. DC Shoes, et. al., filed in the San Diego Superior Court, North County Branch, docketed as Case No. GIN024468, filed on October 1, 2002 ("the Employment Litigation").

18. FDC is the former owner of 3 million shares of stock in DC which, at the time, represented 30% of the issued and outstanding corporate stock of DC. On March 13, 2003, FDC initiated an action for, among other things, the involuntary dissolution of DC, entitled FDC, et. al, vs. DC Shoes, et.al., in the San Diego Superior Court, North County Branch, docketed as Case No. GIN028361 ("the Dissolution Litigation").

19. On or about August 20, 2003, the Blehm Parties, on the one hand, and DC, Block, Way, Way Trust, and DC Trust (collectively referred to as "the DC Parties"), on the other hand, entered into a written Settlement Agreement and Release ("the Agreement") to resolve, among other things, the Employment Litigation and the Dissolution Litigation.

20. The material terms of the Agreement provided that the DC Parties would pay certain consideration to the Blehm Parties to resolve the Employment Litigation and the Dissolution Litigation. The material terms of the Agreement also provided that FDC would sell to DC all the shares of DC corporate stock held by FDC.

21. Among the items of consideration that the DC Parties agreed to pay to the Blehm Parties was an agreement that DC "shall acknowledge and agree that (i) the claim made by the Internal Revenue Service for unpaid taxes relating to Blehm's prior employment with DC Shoes, in the approximate amount of $1,800,000, plus all applicable interest and penalties (the "IRS Claim") is the sole responsibility of DC Shoes, and (ii) none of the [Blehm] Parties shall have any liability or obligation to DC Shoes in connection with the IRS Claim." (Paragraph 5 of the Agreement.) The basis for the IRS Claim was a determination by the Internal Revenue Service in early 2002 that, at all times during his association with DC, Blehm was an employee of DC rather than an

independent contractor engaged through FDC and, thus, employment withholding taxes should have been paid by DC for the entire period of Blehm's association with DC.

FIRST CLAIM FOR RELIEF

(Violation of Securities and Exchange Act of 1934 §10(b) and Rule 10b-5, against the DC Parties, Wright, and DOES 1 through 10, inclusive)

22. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 21 of this complaint as though fully set forth here.

23. On or about August 20, 2003, pursuant to the Agreement, DC purchased from FDC 3 million shares of DC corporate stock then held by FDC.

24. DC's purchase of DC corporate stock from FDC was negotiated by and on behalf of the DC Parties, Wright, and DOES 1 through 10, inclusive. At all times mentioned herein, the DC Parties, Wright, and DOES 1 through 10, inclusive, were in control of DC, and acted as its authorized representatives.

25. DC's purchase of DC corporate stock from FDC was accomplished through instrumentalities of interstate commerce, including the United States mail, telephone calls, email, and bank check and wire transactions.

26. On or about February 16, 2005, the Blehm Parties discovered that the DC Parties, Wright, and DOES 1 through 10, inclusive, failed to disclose material non-public information to the Blehm Parties in connection with DC's purchase of DC corporate stock from FDC. Specifically, on or about February 16, 2005, the Blehm Parties discovered that the DC Parties, Wright, and DOES 1 through 10, inclusive, had failed to disclose that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to a company by the name of Itochu.

27. Based on their discovery of the failure of the DC Parties, Wright, and DOES 1 through 10, inclusive, to disclose that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to Itochu, the Blehm Parties are informed and believe, and based on their information and belief allege that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1

through 10, inclusive, also failed to disclose other material non-public information to the Blehm Parties in connection with DC's purchase of DC corporate stock from FDC. Specifically, the Blehm Parties are informed and believe, and based on their information and belief allege that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 10, inclusive, also failed to disclose that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to other persons or entities.

28. The failure of the DC Parties, Wright, and DOES 1 through 10, inclusive to disclose to the Blehm Parties that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to Itochu at the time DC purchased DC corporate stock from FDC was material, since any DC shareholder, including FDC, would wish to be fully informed about negotiations, offers and potential offers from third parties interested in acquiring DC before making a decision to sell his/her/its DC shares back to DC. The failure of the DC Parties, Wright, and DOES 1 through 10, inclusive to disclose to the Blehm Parties that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to other persons or entities at the time DC purchased DC corporate stock from FDC, based on the Blehm Parties' information and belief, was likewise material. DC was under a duty to disclose to the Blehm Parties any and all material non-public information in its possession at the time DC purchased DC corporate stock from FDC.

29. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, also affirmatively represented to the Blehm Parties, through their legal representatives, that if FDC sold all its shares of DC corporate stock to DC at a certain price, then the DC Parties would pay all taxes, penalties, and interest owing to the Internal Revenue Service relating to Blehm's prior employment with DC. Indeed, the DC Parties, Wright, and DOES 1 through 10, inclusive further affirmatively represented to the Blehm Parties that, after taking into consideration the taxes, penalties, and interest that DC would pay to the Internal Revenue Service on behalf of the Blehm Parties, FDC would receive substantially greater consideration for its shares of DC corporate stock than the established price at which FDC agreed to sell those shares to DC. These representations were likewise material to the Blehm Parties' decision to sell the shares of DC

corporate stock held by FDC to DC for the purchase price set forth in the Agreement. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 10, inclusive, they knew the representations to be false, in that, they knew the DC Parties had no intention of paying the taxes, penalties, and interest (in the approximate amount of $1.8 million) owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On the contrary, at the time these representations were made, the DC Parties, Wright, and DOES 1 through 10, inclusive knew that they would enter into a settlement with the Internal Revenue Service pursuant to Internal Revenue Code §3509, so that the Blehm Parties would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC.

30. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 10, inclusive, made these representations and failed to disclose these non-public material facts to the Blehm Parties, they knew that they were in possession of material non-public information that they were required to disclose to the Blehm Parties. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 10, inclusive, made these representations and failed to disclose these non-public material facts to the Blehm Parties, they did so with the intent to defraud and deceive the Blehm Parties, with the intent to induce the Blehm Parties' to enter into the Agreement, and with the intent to induce FDC to sell to DC all the shares of DC corporate stock held by FDC.

31. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its DC corporate stock to DC, the Blehm Parties were unaware of the falsity of the representations and unaware of the nondisclosure of non-public material facts by the DC Parties, Wright, and DOES 1 through 10, inclusive, and believed the representations to be true and believed there was full disclosure of all material facts. In reliance on the representations and non-disclosure by the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties were induced to and did enter into the Agreement and sold to DC all the shares of DC corporate stock held by FDC.

32. As a proximate result of the misrepresentations and failure of the DC Parties, Wright, and DOES 1 through 10, inclusive, to disclose non-public material facts, the Blehm Parties have

suffered damages in that they entered into the Agreement and sold all the shares of DC corporate stock held by FDC at a lower value than the shares were worth. Had the Blehm Parties known the true facts, that the DC Parties had no intention of paying to the Internal Revenue Service the taxes relating to Blehm's employment, and that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to Itochu and other persons or entities, based on the Blehm Parties information and belief, the Blehm Parties would not have entered into the Agreement. Instead, FDC would have retained its shares of DC corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by negotiating their own sale of DC corporate stock with Itochu or such other persons or entities.

33. The Blehm Parties are informed and believe, and based on their information and belief allege, that as a result of the subsequent sale of DC on or about March 8, 2004, the DC Parties, Wright, and DOES 1 through 10, inclusive, received a considerably greater amount for their DC corporate stock than FDC received for its DC corporate stock under the Agreement. The exact amount of the Blehm Parties' loss has not yet been ascertained. However, the Blehm Parties are informed and believe, and based on their information and belief allege, that the difference between the price paid to FDC by DC for its shares of DC corporate stock, and the price received by the DC Parties, Wright, and DOES 1 through 10, inclusive, for their shares of DC corporate stock, is tens of millions of dollars.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty against the DC Parties, Wright,
and DOES 1 through 10, inclusive)

34. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 33 of this complaint as though fully set forth here.

35. At the time DC purchased FDC's shares of DC corporate stock, DC was under a duty to disclose to the Blehm Parties any and all material non-public information in its possession.

36. As the persons controlling DC, and as the persons negotiating and implementing DC's purchase of DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 10,

inclusive, were likewise under a duty to disclose to the Blehm Parties any and all material non-public information in their possession at the time DC purchased FDC's shares of DC corporate stock.

37. At all times mentioned herein, Block and Way were corporate directors of DC and, as such, owed further duties of care and loyalty to FDC, as a shareholder of DC and, prior to August 20, 2003, to Blehm as a fellow director of DC.

38. The Blehm Parties are informed and believe, and based upon their information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, breached their fiduciary duties to FDC and Blehm by failing to disclose to the Blehm Parties material non-public information that, at the time DC purchased FDC's shares of DC corporate stock, the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to a company by the name of Itochu. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, breached their fiduciary duties to FDC and Blehm by failing to disclose to the Blehm Parties material non-public information that, at the time DC purchased FDC's shares of DC corporate stock, the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to other persons or entities.

39. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 10, inclusive, concealed these non-public material facts from the Blehm Parties, they knew that they were in possession of material non-public information that they were required to disclose to the Blehm Parties. The Blehm Parties are informed and believe, and based upon their information and belief allege, that instead, the DC Parties, Wright, and DOES 1 through 10, inclusive, concealed the material non-public information from the Blehm Parties in order to induce the Blehm Parties to enter into the Agreement, and to induce FDC to sell to DC all the shares of DC corporate stock held by FDC. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that the DC Parties, Wright, and DOES 1 through 10, inclusive, induced the

Blehm Parties to enter into the Agreement, and induced FDC to sell its shares of DC corporate stock to DC, so that the DC Parties, Wright, and DOES 1 through 10, inclusive, could complete the sale of their shares of DC corporate stock to other persons or entities, to the exclusion of the Blehm Parties, and realize a profit for themselves that was much greater than the amount paid to FDC under the Agreement.

40. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its DC corporate stock to DC, the Blehm Parties were unaware of the nondisclosure of non-public material facts by the DC Parties, Wright, and DOES 1 through 10, inclusive, and believed there was full disclosure of all material facts. In reliance on the non-disclosure by the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties were induced to and did enter into the Agreement and sold to DC all the shares of DC corporate stock held by FDC. The Blehm Parties did not discover the true facts until on or about February 16, 2005, when the Blehm Parties learned that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to Itochu.

41. As a proximate result of the fraud and deceit and breach of fiduciary duties by the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties have suffered damages in that they entered into the Agreement and sold all the shares of DC corporate stock held by FDC at a lower value than the shares were worth. Had the Blehm Parties known the true facts, that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to Itochu and other persons or entities, based on the Blehm Parties information and belief, the Blehm Parties would not have entered into the Agreement. Instead, FDC would have retained its shares of DC corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by negotiating their own sale of DC corporate stock with Itochu or other persons or entities.

42. The Blehm Parties are informed and believe, and based on their information and belief allege, that as a result of the sale of DC on or about March 8, 2004, the DC Parties, Wright, and DOES 1 through 10, inclusive, received a considerably greater amount for their DC corporate stock than FDC received for its DC corporate stock under the Agreement. The exact amount of

the Blehm Parties' loss has not yet been ascertained. However, the Blehm Parties are informed and believe, and based on their information and belief allege, that the difference between the price paid to FDC by DC for its shares of DC corporate stock, and the price received by the DC Parties, Wright, and DOES 1 through 10, inclusive, for their shares of DC corporate stock, is tens of millions of dollars.

43. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, also affirmatively represented to the Blehm Parties, through their legal representatives, that if FDC sold all its shares of DC corporate stock to DC at a certain price, then the DC Parties would pay all taxes, penalties, and interest owing to the Internal Revenue Service relating to Blehm's prior employment with DC. Indeed, the DC Parties, Wright, and DOES 1 through 10, inclusive further affirmatively represented to the Blehm Parties that, after taking into consideration the taxes, penalties, and interest that DC would pay to the Internal Revenue Service on behalf of the Blehm Parties, FDC would receive substantially greater consideration for its shares of DC corporate stock than the established price at which FDC agreed to sell those shares to DC. These representations were likewise material to the Blehm Parties' decision to sell the shares of DC corporate stock held by FDC to DC for the purchase price set forth in the Agreement. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 10, inclusive, they knew the representations to be false, in that, they knew the DC Parties had no intention of paying the taxes, penalties, and interest (in the approximate amount of $1.8 million) owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On the contrary, at the time these representations were made, the DC Parties, Wright, and DOES 1 through 10, inclusive knew that they would enter into a settlement with the Internal Revenue Service pursuant to Internal Revenue Code §3509, so that the Blehm Parties would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC.

44. The Blehm Parties are informed and believe and based upon their information and belief allege, that the conduct of the DC Parties, Wright, and DOES 1 through 10, inclusive, was an intentional misrepresentation and an intentional concealment of material non-public facts known to the DC Parties, Wright, and DOES 1 through 10, inclusive, done with the intention on their

part to deprive the Blehm Parties of property and legal rights causing injury, and was despicable conduct that subjected the Blehm Parties to cruel and unjust hardship in conscious disregard of the rights of the Blehm Parties, so as to justify an award of exemplary and punitive damages.

THIRD CLAIM FOR RELIEF

(Intentional Concealment against the DC Parties, Wright,
and DOES 1 through 10, inclusive)

45. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 44 of this complaint as though fully set forth here.

46. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its shares of DC corporate stock to DC, the DC Parties, Wright, and DOES 1 through 10, inclusive, were under a duty to disclose to the Blehm Parties any and all material non-public information in their possession.

47. The Blehm Parties are informed and believe, and based upon their information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, concealed material non-public information from the Blehm Parties that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to a company by the name of Itochu. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, concealed material non-public information from the Blehm Parties that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to other persons or entities.

48. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, also affirmatively represented to the Blehm Parties, through their legal representatives, that if FDC sold all its shares of DC corporate stock to DC at a certain price, then the DC Parties would pay all taxes, penalties, and interest owing to the Internal Revenue Service relating to Blehm's prior employment with DC. Indeed, the DC Parties, Wright, and DOES 1 through 10, inclusive further affirmatively represented to the Blehm Parties that, after taking into consideration the taxes, penalties, and interest that DC would pay to the Internal Revenue Service on behalf of the

Blehm Parties, FDC would receive substantially greater consideration for its shares of DC corporate stock than the established price at which FDC agreed to sell those shares to DC. These representations were likewise material to the Blehm Parties' decision to sell the shares of DC corporate stock held by FDC to DC for the purchase price set forth in the Agreement. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 10, inclusive, they knew the representations to be false, in that, they knew the DC Parties had no intention of paying the taxes, penalties, and interest (in the approximate amount of $1.8 million) owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On the contrary, at the time these representations were made, the DC Parties, Wright, and DOES 1 through 10, inclusive knew that they would enter into a settlement with the Internal Revenue Service pursuant to Internal Revenue Code §3509, so that the Blehm Parties would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC.

49. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 10, inclusive, made these representations and concealed these non-public material facts from the Blehm Parties, they knew that the representations were false and that they were in possession of material non-public information that they were required to disclose to the Blehm Parties. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties, Wright, and DOES 1 through 10, inclusive, made these representations and concealed the material non-public information from the Blehm Parties in order to induce the Blehm Parties to enter into the Agreement, and to induce FDC to sell to DC all the shares of DC corporate stock held by FDC. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that the DC Parties, Wright, and DOES 1 through 10, inclusive, induced the Blehm Parties to enter into the Agreement, and induced FDC to sell its shares of DC corporate stock to DC, so that the DC Parties, Wright, and DOES 1 through 10, inclusive, could complete the sale of their shares of DC corporate stock to others, to the exclusion of the Blehm Parties, and realize a profit for themselves that was much greater than the amount paid to FDC under the Agreement.

50. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its DC corporate stock to DC, the Blehm Parties were unaware of the falsity of the representations and the nondisclosure of non-public material facts by the DC Parties, Wright, and DOES 1 through 10, inclusive, and believed the representations to be true and believed there was full disclosure of all material facts. In reliance on the representations and non-disclosure by the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties were induced to and did enter into the Agreement and sold to DC all the shares of DC corporate stock held by FDC. The Blehm Parties did not discover the true facts until on or about February 16, 2005, when the Blehm Parties learned that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to Itochu.

51. As a proximate result of the fraud and deceit by the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties have suffered damages in that they entered into the Agreement and sold all the shares of DC corporate stock held by FDC at a lower value than the shares were worth. Had the Blehm Parties known the true facts, that the DC Parties had no intention of paying to the Internal Revenue Service the taxes relating to Blehm's employment, and that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to Itochu and other persons or entities, based on the Blehm Parties information and belief, the Blehm Parties would not have entered into the Agreement. Instead, FDC would have retained its shares of DC corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by negotiating their own sale of DC corporate stock with Itochu or other persons or entities.

52. The Blehm Parties are informed and believe, and based on their information and belief allege, that as a result of the sale of DC on or about March 8, 2004, the DC Parties, Wright, and DOES 1 through 10, inclusive, received a considerably greater amount for their DC corporate stock than FDC received for its DC corporate stock under the Agreement. The exact amount of the Blehm Parties' loss has not yet been ascertained. However, the Blehm Parties are informed and believe, and based on their information and belief allege, that the difference between the price paid to FDC by DC for its shares of DC corporate stock, and the price received by the DC

Parties, Wright, and DOES 1 through 10, inclusive, for their shares of DC corporate stock, is tens of millions of dollars.

53. The Blehm Parties are informed and believe and based upon their information and belief allege, that the conduct of the DC Parties, Wright, and DOES 1 through 10, inclusive, was an intentional misrepresentation and an intentional concealment of a material non-public fact known to the DC Parties, Wright, and DOES 1 through 10, inclusive, done with the intention on their part to deprive the Blehm Parties of property and legal rights causing injury, and was despicable conduct that subjected the Blehm Parties to cruel and unjust hardship in conscious disregard of the rights of the Blehm Parties, so as to justify an award of exemplary and punitive damages.

FOURTH CLAIM FOR RELIEF

(Negligent Failure to Disclose against the DC Parties, Wright, and DOES 1 through 10, inclusive)

54. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 53 of this complaint as though fully set forth here.

55. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its shares of DC corporate stock to DC, the DC Parties, Wright, and DOES 1 through 10, inclusive, were under a duty to disclose to the Blehm Parties any and all material non-public information in their possession.

56. As the persons controlling DC, and as the persons negotiating and implementing DC's purchase of DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 10, inclusive, were under a duty to disclose to the Blehm Parties any and all material non-public information in their possession at the time DC purchased FDC's shares of DC corporate stock.

57. At all times mentioned herein, Block and Way were corporate directors of DC and, as such, owed further duties of care and loyalty to FDC, as a shareholder of DC and, prior to August 20, 2003, to Blehm as a fellow director of DC.

58. The Blehm Parties are informed and believe, and based upon their information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10,

inclusive, failed to disclose material non-public information to the Blehm Parties that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to a company by the name of Itochu. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, failed to disclose material non-public information to the Blehm Parties that the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to other persons or entities.

59. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, also affirmatively represented to the Blehm Parties, through their legal representatives, that if FDC sold all its shares of DC corporate stock to DC at a certain price, then the DC Parties would pay all taxes, penalties, and interest owing to the Internal Revenue Service relating to Blehm's prior employment with DC. Indeed, the DC Parties, Wright, and DOES 1 through 10, inclusive further affirmatively represented to the Blehm Parties that, after taking into consideration the taxes, penalties, and interest that DC would pay to the Internal Revenue Service on behalf of the Blehm Parties, FDC would receive substantially greater consideration for its shares of DC corporate stock than the established price at which FDC agreed to sell those shares to DC. These representations were likewise material to the Blehm Parties' decision to sell the shares of DC corporate stock held by FDC to DC for the purchase price set forth in the Agreement. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 10, inclusive, they had no reason to believe they were true, in that, they knew the DC Parties had no intention of paying the taxes, penalties, and interest (in the approximate amount of $1.8 million) owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On the contrary, at the time these representations were made, the DC Parties, Wright, and DOES 1 through 10, inclusive knew that they would enter into a settlement with the Internal Revenue Service pursuant to Internal Revenue Code §3509, so that the Blehm Parties would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC.

60. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 10, inclusive, made these

representations and failed to disclose these non-public material facts to the Blehm Parties, they knew or reasonably should have known that they were in possession of material non-public information that they were required to disclose to the Blehm Parties.

61. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its DC corporate stock to DC, the Blehm Parties were unaware of the falsity of the representations and nondisclosure of non-public material facts by the DC Parties, Wright, and DOES 1 through 10, inclusive, and believed the representations and believed there was full disclosure of all material facts. In reliance on the representations and non-disclosure by the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties were induced to and did enter into the Agreement and sold to DC all the shares of DC corporate stock held by FDC. The Blehm Parties did not discover the true facts until on or about February 16, 2005, when the Blehm Parties learned that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 10, inclusive, were negotiating terms to sell DC to Itochu.

62. As a proximate result of the misrepresentations and the failure of the DC Parties, Wright, and DOES 1 through 10, inclusive, to disclose material non-public information, the Blehm Parties have suffered damages in that they entered into the Agreement and sold all the shares of DC corporate stock held by FDC at a lower value than the shares were worth. Had the Blehm Parties known the true facts, that the DC Parties were negotiating terms to sell DC to Itochu and other persons or entities, based on the Blehm Parties information and belief, the Blehm Parties would not have entered into the Agreement. Instead, FDC would have retained its shares of DC corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by negotiating their own sale of DC corporate stock with Itochu or other persons or entities.

63. The Blehm Parties are informed and believe, and based on their information and belief allege, that as a result of the sale of DC on or about March 8, 2004, the DC Parties, Wright, and DOES 1 through 10, inclusive, received a considerably greater amount for their DC corporate stock than FDC received for its DC corporate stock under the Agreement. The exact amount of the Blehm Parties' loss has not yet been ascertained. However, the Blehm Parties are informed

and believe, and based on their information and belief allege, that the difference between the price paid to FDC by DC for its shares of DC corporate stock, and the price received by the DC Parties, Wright, and DOES 1 through 10, inclusive, for their shares of DC corporate stock, is tens of millions of dollars.

FIFTH CLAIM FOR RELIEF

(Injunctive Relief against the DC Parties)

64. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 63 of this complaint as though fully set forth here.

65. The Blehm Parties are informed and believe, and based on their information and belief allege, that as part of the sale of DC to Quiksilver, Inc. ("Quiksilver") on or about March 8, 2004, the DC Parties received consideration from Quiksilver that included shares of stock in Quiksilver.

66. The Blehm Parties have suffered and will continue to suffer great and irreparable injury if the DC Parties are permitted to retain those shares of Quiksilver stock that would have been received by the Blehm Parties but for the fraud and deceit of the DC Parties, Wright, and DOES 1 through 10, inclusive, as alleged above.

67. The Blehm Parties have no adequate remedy at law for their injuries, because Quiksilver stock is unique, and its exact value is difficult to calculate.

68. There is a reasonable probability that the Blehm Parties will prevail on the merits of their claims.

69. Accordingly, the Blehm Parties are entitled to a mandatory injunction requiring the DC Parties to transfer to the Blehm Parties those shares of Quiksilver stock held by the DC Parties that would have been received by the Blehm Parties but for the fraud and deceit of the DC Parties, Wright, and DOES 1 through 10, inclusive, as alleged above.

SIXTH CLAIM FOR RELIEF

(Specific Performance against the DC Parties)

70. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 69 of this complaint as though fully set forth here.

71. The Blehm Parties have performed all conditions, covenants and promises required to be performed by them in accordance with the terms and conditions of the Agreement.

72. The consideration given by the Blehm Parties under the Agreement was fair and reasonable. At the time the Agreement was entered into, its terms were just and reasonable as to the DC Parties.

73. The DC Parties have failed and refused to perform their obligations under the Agreement to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC, and to assure that none of the Blehm Parties would have any liability or obligation to the Internal Revenue Service for the taxes, interest, and penalties relating to Blehm's prior employment with DC.

74. The Blehm Parties have no adequate legal remedy in that damages, if awarded, will not compensate the Blehm Parties for the damage to their credibility with the Internal Revenue Service if the IRS Claim is not paid by the DC Parties.

SEVENTH CLAIM FOR RELIEF

(Breach of Written Contract against the DC Parties)

75. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 74 of this complaint as though fully set forth here.

76. The Blehm Parties have performed all conditions, covenants and promises required to be performed by them in accordance with the terms and conditions of the Agreement.

77. The Blehm Parties have requested that the DC Parties fulfill their obligations pursuant to paragraph 5 of the Agreement by paying the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC. The DC Parties have breached the Agreement and failed and refused, and continue to fail and refuse, to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

78. As a direct result of the DC Parties' breach, the Blehm Parties have suffered damages in the amount of approximately $2.2 million, representing the amount now being demanded from

the Blehm Parties by the Internal Revenue Service for taxes, interest, and penalties relating to Blehm's prior employment with DC.

79. As part of the Agreement, the DC Parties agreed to pay reasonable attorney's fees incurred by the Blehm Parties in any action brought to enforce or interpret the Agreement. (Paragraph 15.6 of the Agreement.) Accordingly, the Blehm Parties are entitled to recover reasonable attorney's fees incurred in bringing and prosecuting this action.

EIGHTH CLAIM FOR RELIEF

(Intentional Misrepresentation against the DC Parties, Wright, and DOES 1 through 10, inclusive)

80. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 79 of this complaint as though fully set forth here.

81. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, falsely and fraudulently represented to the Blehm Parties that the DC Parties would be solely responsible for payment of the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On or about August 20, 2003, the DC Parties further falsely and fraudulently represented to the Blehm Parties that none of the Blehm Parties would have any liability or obligation for the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

82. The representations made by the DC Parties, Wright, and DOES 1 through 10, inclusive, were in fact false. The truth was that the DC Parties never intended to be solely responsible for the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC, and the DC Parties never intended to assure that none of the Blehm Parties would have any liability or obligation to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC. In fact, the Blehm Parties are informed and believe, and based upon their information and belief allege, that instead, the DC Parties intended to enter into a separate settlement with the Internal Revenue Service to the exclusion of the Blehm Parties, whereby the Internal Revenue Service would continue to

seek payment of taxes, interest, and penalties relating to Blehm's prior employment with DC from the Blehm Parties.

83. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 10, inclusive, made their representations, they knew them to be false. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties, Wright, and DOES 1 through 10, inclusive, made these representations with the intent to defraud and deceive the Blehm Parties and with the intent to induce the Blehm Parties to enter into the Agreement and deliver consideration to the DC Parties pursuant to the Agreement.

84. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 10, inclusive, and at the time the Blehm Parties entered into the Agreement, the Blehm Parties were unaware of the falsity of the representations made by the DC Parties, Wright, and DOES 1 through 10, inclusive, and believed them to be true. In reliance on the representations of the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties were induced to and did agree to enter into the Agreement and deliver consideration to the DC Parties pursuant to the Agreement.

85. The Blehm Parties did not discover the true facts until on or about January 3, 2005, when the DC Parties rejected the Blehm Parties' demand that the DC Parties pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

86. As a proximate result of the fraud and deceit of the DC Parties, Wright, and DOES 1 through 10, inclusive, and the facts alleged herein, the Blehm Parties have suffered damages in excess of $2,200,000, representing the amount now being demanded from the Blehm Parties by the Internal Revenue Service for taxes, interest, and penalties relating to Blehm's prior employment with DC.

87. The Blehm Parties are informed and believe and based upon their information and belief allege, that the conduct of the DC Parties, Wright, and DOES 1 through 10, inclusive, was an intentional misrepresentation of material fact known to the DC Parties, Wright, and DOES 1

through 10, inclusive, made with the intention on their part to deprive the Blehm Parties of property and legal rights causing injury, and was despicable conduct that subjected the Blehm Parties to cruel and unjust hardship in conscious disregard of the Blehm Parties' rights, so as to justify an award of exemplary and punitive damages.

NINTH CLAIM FOR RELIEF

(Negligent Misrepresentation against the DC Parties, Wright, and DOES 1 through 10, inclusive)

88. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 87 of this complaint as though fully set forth here.

89. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, represented to the Blehm Parties that the DC Parties would be solely responsible for payment of taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 10, inclusive, further represented to the Blehm Parties that none of the Blehm Parties would have any liability or obligation to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

90. The representations made by the DC Parties, Wright, and DOES 1 through 10, inclusive, were in fact false. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties never intended to be solely responsible for payment of the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC, and never intended to assure that none of the Blehm Parties would have any liability or obligation to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

91. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 10, inclusive, made these representations, they had no reasonable ground for believing them to be true. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties, Wright, and DOES 1 through 10, inclusive, made these representations with the intent to induce

the Blehm Parties to act in the manner herein alleged.

92. The Blehm Parties, at the time these representations were made by the DC Parties, Wright, and DOES 1 through 10, inclusive, and at the time the Blehm Parties entered into the Agreement, were unaware of the falsity of the representations and believed them to be true. In reliance on the representations of the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties were induced to and did agree to enter into the Agreement and deliver consideration to the DC Parties pursuant to the Agreement.

93. The Blehm Parties did not discover the true facts until on or about January 3, 2005, when the DC Parties rejected the Blehm Parties' demand that the DC Parties pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

94. As a proximate result of the fraud and deceit of the DC Parties, Wright, and DOES 1 through 10, inclusive, and the facts alleged herein, the Blehm Parties have suffered damages in excess of $2,200,000, representing the amount now being demanded from the Blehm Parties by the Internal Revenue Service for payment of taxes, interest, and penalties relating to Blehm's prior employment with DC.

TENTH CLAIM FOR RELIEF

(Rescission against the DC Parties)

95. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 94 of this complaint as though fully set forth here.

96. In the alternative, the Blehm Parties seek to rescind the Agreement based on the fraud committed by the DC Parties, Wright, and DOES 1 through 10, inclusive, as alleged herein.

97. The Blehm Parties will suffer substantial harm and injury under the Agreement if it is not rescinded. As a result of the conduct of the DC Parties, Wright, and DOES 1 through 10, inclusive, the Blehm Parties will be deprived of their bargain in that, had the Blehm Parties known the true facts, that the DC Parties were negotiating terms to sell DC to Itochu and other persons or entities, based on the Blehm Parties information and belief, the Blehm Parties would

not have entered into the Agreement. Instead, FDC would have retained its shares of DC corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by negotiating their own sale of DC corporate stock with Itochu or other persons or entities.

98. The Blehm Parties intend service of the summons and complaint in this action to serve as notice of rescission of the Agreement, and hereby offer to restore all consideration furnished by the DC Parties under the Agreement, on condition that the DC Parties restore to them the consideration furnished by the Blehm Parties, including all the shares of DC corporate stock formerly held by FDC.

99. In the alternative, if it is no longer possible for the DC Parties to return the shares of DC corporate stock purchased from FDC, then the Blehm Parties request equitable relief permitting them to share in the consideration received by the DC Parties from Quiksilver, in the ratio the Blehm Parties would have received had they not been fraudulently induced into executing the Agreement.

100. As a result of entering into the Agreement, the Blehm Parties have also suffered consequential damages in an amount according to proof.

101. The Blehm Parties are informed and believe and based upon their information and belief allege, that the conduct of the DC Parties, Wright, and DOES 1 through 10, inclusive, was an intentional misrepresentation, deceit, or concealment of a material fact known to the DC Parties, Wright, and DOES 1 through 10, inclusive, done with the intention on their part to deprive the Blehm Parties of property and legal rights causing injury, and was despicable conduct that subjected the Blehm Parties to cruel and unjust hardship in conscious disregard of the Blehm Parties' rights, so as to justify an award of exemplary and punitive damages.

ELEVENTH CLAIM FOR RELIEF

(Unjust Enrichment against the DC Parties)

102. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 101 of this complaint as though fully set forth here.

103. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties gained a substantial benefit when they obtained FDC's agreement to sell all its shares of DC corporate stock to DC, since the DC Parties convinced the Blehm Parties to part with shares of DC corporate stock for an amount much less than the amount the DC Parties, in turn, planned to sell their shares of DC corporate stock to other persons or entities.

104. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties profited from the sale of DC corporate stock to Quiksilver in increased proportion, because the DC Parties excluded and defrauded the Blehm Parties.

105. The DC Parties also profited from their separate settlement with the Internal Revenue Service to the exclusion of the Blehm Parties, whereby the Internal Revenue Service would continue to seek payment of taxes, interest, and penalties relating to Blehm's prior employment with DC from the Blehm Parties. Under the Agreement, the DC Parties originally agreed to pay approximately $1,800,000, plus all applicable interest and penalties, in connection with the taxes, interest, and penalties relating to Blehm's prior employment with DC, with that amount to be credited to the benefit of the Blehm Parties. Instead, the DC Parties entered into a separate settlement with the Internal Revenue Service whereby the DC Parties paid only a fraction of the taxes, interest, and penalties relating to Blehm's prior employment with DC, and whereby no portion of the payment made was credited to the benefit of the Blehm Parties, leaving the Blehm Parties to be pursued by the Internal Revenue Service for the remaining taxes, interest, and penalties relating to Blehm's prior employment with DC.

106. The Blehm Parties are informed and believe, and based upon their information and belief allege, that it is unjust to allow the DC Parties to retain the ill-gotten benefits they received under the Agreement at the expense of the Blehm Parties.

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WHEREFORE, the Blehm Parties pray judgment against the defendants, and each of them, as follows:

ON THE FIRST, SECOND, THIRD, AND FOURTH CLAIMS FOR RELIEF

1. For damages representing the difference between the consideration received by the Blehm Parties from the DC Parties for the purchase of DC corporate stock, and the consideration paid to the DC Parties by Quiksilver for the purchase of DC corporate stock. The exact amount of the Blehm Parties' loss has not yet been ascertained, but is believed to be in the tens of millions of dollars;.

ON THE SECOND, THIRD, EIGHTH, AND TENTH CLAIMS FOR RELIEF

2. For exemplary and punitive damages;

ON THE FIFTH CLAIM FOR RELIEF

3. For mandatory injunctive relief requiring the DC Parties to transfer to the Blehm Parties those shares of Quiksilver stock held by the DC Parties that would have been received by the Blehm Parties but for the fraud and deceit of the DC Parties, Wright, and DOES 1 through 10, inclusive;

ON THE SIXTH CLAIM FOR RELIEF

4. For an order specifically enforcing the Agreement and requiring the DC Parties to pay the IRS Claim, plus all interest and penalties that continue to accrue;

ON THE SEVENTH, EIGHTH, AND NINTH CLAIMS FOR RELIEF

5. For compensatory damages in the amount of approximately $2,200,000, plus applicable penalties and interest;

ON THE FIRST, SIXTH, AND SEVENTH CLAIMS FOR RELIEF

6. For reasonable attorneys' fees;

ON THE TENTH CLAIM FOR RELIEF

7. For rescission of the Agreement;

8. In the alternative, equitable relief permitting the Blehm Parties to share in the consideration received by the DC Parties from Quiksilver, in the ratio the Blehm Parties would have received had they not been fraudulently induced into executing the Agreement;

ON THE ELEVENTH CLAIM FOR RELIEF

9. The return of all unjust benefits received by the DC Parties in connection with the Agreement;

ON ALL CAUSES OF ACTION

10. For statutory prejudgment interest; and

11. For such other and further relief as the court deems just and proper.

DATED: 7-13-05

McCOLLOCH & CAMPITIELLO, LLP

By: [signature]
Lawrence G. Campitiello, Esq.
Attorneys for plaintiffs
CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC

DATED: July 6, 2005

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP

By: [signature]
Pamela J. Naughton, Esq
Attorneys for plaintiffs
CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC

DEMAND FOR JURY TRIAL

The Blehm Parties hereby demand a jury trial to the extent permitted by law.

DATED: 7-13-05

McCOLLOCH & CAMPITIELLO, LLP

By: [signature]
Lawrence G. Campitiello, Esq.
Attorneys for plaintiffs
CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC.

DATED: July 6, 2005

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP

By: Pamela J. Naughton
Pamela J. Naughton, Esq
Attorneys for plaintiffs
CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC

Exhibit 7

O'MELVENY & MYERS CALENDAR 192986.2 FEB 28 2006 CAL. DKT. ATTYS: MGY MJM

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CLERK US DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation, Plaintiffs, v. DC SHOES, INC., a California corporation; et al., Defendants.	Civil No.05CV1418 JAH (WMc) **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS [DOC. NO. 3]**

INTRODUCTION

Now before the Court is Defendant DC Shoes, Inc., Kenneth Block, Damon Way, the Damon Way Revocable Trust and Brian Wright (collectively "Defendants") motion to dismiss Plaintiff Clayton Blehm, Clayton Blehm Living Trust and FDC Investments, Inc. (collectively "Plaintiffs") first (violation of the Securities and Exchange Act §10 and Rule 10b-5), second (breach of fiduciary duty), third (intentional concealment), fourth (negligent failure to disclose), eighth (intentional misrepresentation) and ninth (negligent misrepresentation) claims for relief. The motion has been fully briefed by the parties. After a careful consideration of the pleadings and relevant exhibits submitted by the parties, and for the reasons set forth below, this Court GRANTS Defendants' motion to dismiss under Federal Rules of Civil Procedure 12(b)(6).

BACKGROUND

1. **Factual Background**

Plaintiff Clayton Blehm ("Blehm") was, until June 30, 2002, Chief Financial Officer at Defendant DC Shoes, Inc. ("DC Shoes"), a designer and manufacturer of sportswear and footwear in San Diego county. Cplt. at 5. Blehm's termination from DC Shoes gave rise to an employment lawsuit (the "employment litigation"), filed in San Diego Superior Court on October 1 2002. Id.

On March 13, 2003, Plaintiff FDC Investments, Inc. ("FDC") initiated a lawsuit against DC Shoes seeking, among other things, involuntary dissolution of the company (the "dissolution litigation"). *See* Cplt. at 5. Plaintiff Blehm is the chief executive officer of FDC, and at the time of the lawsuit, was a 30% shareholder of DC Shoes stock. Id. at 2.

On or about August 20, 2003, Plaintiffs entered into a written settlement agreement (the "Agreement") with Defendants to resolve both the employment litigation and dissolution litigation. The complaint alleges that the Agreement provided that Defendants "would pay certain consideration to [Plaintiffs]" as well as provide "that FDC would sell to [DC Shoes] all the shares of [DC Shoes] corporate stock held by FDC." Cplt. at 5. The complaint also alleges that Defendants agreed to pay for "'unpaid taxes relating to Blehm's prior employment with DC Shoes . . . and (ii) none of [Plaintiffs] shall have any liability or obligation to DC Shoes in connection with the IRS Claim." Id., citing "Paragraph 5 of the Agreement." The complaint does not attach a copy of the Agreement.

On or about February 16, 2005, Plaintiffs contend they "discovered that [Defendants] failed to disclose material non-public information to [Plaintiffs] in connection with [DC Shoes]'s purchase of [DC Shoes] corporate stock from FDC." *See* Cplt. at 6. In particular, Plaintiffs allege that Defendant DC Shoes failed to inform Plaintiffs of negotiations to sell DC Shoes to another company, including a company named Itochu. *See* id. at 6. The suit identifies Defendant Block as "an officer, director and shareholder of DC," and Defendant Way as "an officer and director of DC." Id. at 3. Defendant Way is alleged as a trustee of Defendant Damon Way Revocable Living Trust, which is a shareholder in DC Shoes, Inc. Id. The complaint also identifies Defendant Way and Block as trustees of Defendant DC Shoes Employee Share Trust, which is a shareholder of Defendant DC Shoes. Id. Finally, the complaint alleges that Defendant Wright is an "officer of DC, its general counsel, and a shareholder of DC by virtue of his participation in DC Trust." Id. at 4.

Plaintiffs also allege that Defendants knew they "had no intention of paying the taxes, penalties, and interest . . . owing to the Internal Revenue Service." Plaintiffs allege instead that Defendants "knew that they would enter into a settlement agreement with the Internal Revenue Service pursuant to Internal Revenue Code §3509, so that [Plaintiffs] would remain responsible for payment" of the unpaid taxes, interests and penalties to the Internal Revenue Service. Id. at 8.

2. Procedural Background

Plaintiffs filed the instant complaint on July 14, 2005, alleging violations of the Securities and Exchange Act under § 10(b) and Rule 10b-5, Breach of Fiduciary Duty, Intentional Concealment, Negligent Failure to Disclose, Breach of Written Contract, Intentional and Negligent Misrepresentation and Unjust Enrichment. Plaintiffs seek monetary and punitive damages, as well as injunctive relief from Defendants. Plaintiffs also seek specific performance of a settlement agreement negotiated between the parties, or in the alternative, rescission of the agreement.

Defendants filed the instant motion to dismiss on August 31, 2005. *See* Doc. No. 3. Plaintiffs filed an opposition to the motion on October 20, 2005. *See* Doc. No. 5. Defendants filed nunc pro tunc a reply to Plaintiffs' opposition on October 27, 2005. *See* Doc. No. 9. On October 28, 2005, this motion was taken under submission without an oral hearing pursuant to Civ.LR 7.1(d.1). *See* Doc. No. 7.

DISCUSSION

1. Legal Standard

A. Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal of a claim under this Rule is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Navarro, 250 F.3d at 732. Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); *see* Neitzke v. Williams, 490 U.S. 319, 326-27 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. Robertson, 749 F.2d at 534.

In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. Roberts, 812 F.2d at 1177; Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice. Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998); Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994); MGIC Indem. Co. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986).

B. Rule 9(b)

Rule 9(b) states in relevant part that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. Rules Civ. P. 9(b). Thus, Rule 9(b) requires that parties must "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." Vess v. Ciba-Geigy Corp., U.S.A., 317 F.3d 1097, 1106 (9th Cir. 2003).

Under Ninth Circuit case law, Rule 9(b) imposes two distinct requirements on complaints alleging fraud, including securities fraud. First, the basic notice requirements of

Rule 9(b) require complaints pleading fraud to "state precisely the time, place, and nature of the misleading statements, misrepresentations, or specific acts of fraud." Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994); Vess, 317 F.3d at 1106 (A plaintiff must set forth "the who, what, when, where and how" of the alleged misconduct."). Second, the Rule requires that the complaint "set forth an explanation as to why the statement or omission complained of was false and misleading." Yourish v. California Amplifier, 191 F.3d 983, 993 (9th Cir. 1999). A complaint may demonstrate the false or misleading character of a statement by identifying inconsistent contemporaneous statements made by the defendants or inconsistent contemporaneous information that was available to the defendants. Yourish, 191 F.3d at 994; DeMarco v. DepoTech Corp., 149 F.Supp.2d 1212, 1223 (S.D. Cal. 2001). A complaint may not, however, demonstrate that a statement was false or misleading when made "merely by pointing to later inconsistent statements or conditions." DeMarco, 149 F.Supp.2d at 1223.

C. Securities Act

Section 10(b) of the Securities and Exchange Act of 1934 makes it unlawful to use in connection with the mails or facilities of interstate commerce any "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commissioner may prescribe." 15 U.S.C. § 78j. SEC Rule 10b-5, promulgated under section 10(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

In order to properly allege a claim under section 10(b) of the Exchange Act and SEC Rule 10b-5, a plaintiff must state the following: (1) defendants made a false statement or omission with regard to a material fact; (2) in connection with the purchase or the sale of a security; (3) with scienter; (4) upon which plaintiff reasonably relied; (5) to his/her harm or detriment. Binder v. Gillespie, 184 F.3d 1059, 1063 (9th Cir. 1999), *cert. denied*, 528 U.S.

1154 (2000); Paracor Fin., Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1157 (9th Cir. 1996). Scienter is a "mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n. 12 (1976); In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 975 (9th Cir. 1999). With respect to scienter claims under the Securities Act, the court may consider all inferences gleaned from the complaint, including inferences in favor of the moving party. Employees Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co., 353 F.3d 1125, 1134 (9th Cir. 2004).

Additional regulations governing security fraud claims include the Private Securities Litigation Reform Act of 1995 ("PSLRA" or "Reform Act"), which was established in 1995 to ensure uniform and stringent pleading requirements for securities fraud actions. The PSLRA specifies the required pleading standard for securities fraud actions:

> (1) Misleading statements and omissions
>
> In any private action arising under this chapter in which the plaintiff alleges that the defendant —
> (A) made an untrue statement of a material fact; or
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
> the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

15 U.S.C. §78u-4(b)(1).

Thus, the PSLRA requires complaints alleging federal securities fraud to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). "The purpose of this heightened pleading requirement was generally to eliminate abusive securities litigation and particularly to put an end to the practice of pleading fraud by hindsight." In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1084 (9th Cir. 2002). As recently interpreted by the Ninth Circuit, this language requires a private securities plaintiff to plead particular facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct. In re Silicon Graphics, 183 F.3d at 977, 979. Recklessness satisfies the scienter requirement only insofar as it reflects some degree of conscious or deliberate misconduct; *i.e.*, "a degree of recklessness that strongly suggests actual intent." Id. at 979. The PSLRA further provides that "the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met." 15 U.S.C. § 78u-4(b)(3)(A).

2. **Analysis**

Defendants move to dismiss Plaintiffs' first (violation of the Securities and Exchange Act §10 and Rule 10b-5), second (breach of fiduciary duty), third (intentional concealment), fourth (negligent failure to disclose), eighth (intentional misrepresentation) and ninth (negligent misrepresentation) claims for relief. *See* Doc. No. 4 at 1. Defendants contend that Plaintiffs: 1) fail to satisfy the pleading requirements of Fed. R. Civ. P. 9(b) and the Private Securities Litigation Reform Act of 1995 ("Reform Act"); 2) fail to plead facts that give rise to a strong inference of scienter; and 3) do not allege "loss causation" to support a securities fraud claim. *See* id.

A. Securities Fraud (Plaintiffs' Claim One)

a. Particularity Requirement

With respect to Plaintiffs' first cause of action, which the parties agree is governed by Rule 9(b) and the PSLRA, Defendants allege that Plaintiffs do not provide "a single fact . . . in support of [their] purported theory" in violation of Rule 9(b) and the PSLRA. Doc. No. 4 at 6. Plaintiffs counter by stating that "[t]he PSLRA 'does not require the plaintiffs to plead with particularity every single fact upon which their beliefs concerning false or misleading statements are based.'" Doc. No. 5 at 11, quoting Adams v. Kinder-Morgan, Inc., 340 F.3d 1083, 1102 (10th Cir. 2003).

Contrary to Plaintiffs' assertion, the Ninth Circuit has made clear that to "avoid dismissal under the PSLRA, the Complaint must 'specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which the belief is formed.'" Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1230 (9th Cir. 2004), quoting 15 U.S.C. § 78u-4(b)(1). Plaintiff cites to GlenFed, as well as non-precedential decisions, as support for a lower standard of pleading in securities fraud actions. *See* Doc. No. 5 at 7, citing In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1542 (9th Cir. 1994). This Court does not agree with Plaintiff. GlenFed was decided prior to the enactment of the PSLRA, and therefore does not take into account the heightened language present in the statute. For example, in contrast to Plaintiffs' contentions, the plain language of the statute does require the complaint to "state with particularity *all* facts on which the belief is formed." 15 U.S.C. § 78u-4(b)(1) (emphasis added). Therefore, Plaintiffs are required by statute to fully present *all* facts in support of their allegations of misrepresentation or omission if the complaint is plead on information and belief.

Here, Plaintiffs appear to allege actual knowledge, as well as information and belief of the wrongful acts. For example, under the first claim of relief for securities fraud, Plaintiffs state:

> On or about February 16, 2005, the Blehm Parties discovered that [Defendants] failed to disclose material non-public information to [Plaintiffs] in connection with DC's purchase of DC corporate stock from FDC. Specifically, on or about February 16, 2005, [Plaintiffs] *discovered* that [Defendants] had failed to disclose that, at the time DC purchased DC corporate stock from FDC, [Defendants] were negotiating terms to sell DC to a company by the name of Itochu.

Cplt. at ¶ 26 (emphasis added). The use of the word "discovered" indicates that Plaintiffs had knowledge during the relevant period of Defendants' failure to disclose their alleged negotiations with Itochu to sell DC Shoes, Inc.

Plaintiffs also state that:

> [B]ased on their information and belief allege that, at the time DC purchased DC corporate stock from FDC, [Defendants] also failed to disclose other material non-public information to [Plaintiffs] in connection with DC's purchase of DC corporate stock from FDC. Specifically, [Plaintiffs] are informed and believe, and based on their information and belief allege that, at the time DC purchased DC corporate stock from [Plaintiffs], also failed to disclose that [Defendants], were negotiating terms to sell DC to other persons or entities.

Cplt. at ¶ 27. Here, Plaintiffs plead on "information and belief" that Defendants spoke to other third-party companies regarding the sale of DC Shoes, Inc. Thus, in regards to the misrepresentations and omissions of the alleged talks of a DC Shoes, Inc. sale to other companies, Plaintiffs plead factual allegations based on knowledge, as well as on information and belief.

Because Plaintiffs are required by statute to "state with particularity all facts on which the belief is formed," this Court finds that Plaintiffs' complaint falls short of this requirement. Plaintiffs must include all information in their possession regarding the alleged negotiations to sell and how Plaintiffs obtained these factual allegations. *See* In re Silicon Graphics, 183 F.3d at 984. Plaintiffs argue that this type of information "is in Defendants' control that would likely be produced during discovery." Doc. No. 5 at 12. Plaintiff cites to Neubronner v. Milken, 6 F.3d 666 (9th Cir. 1993) for its proposition that a motion to dismiss should not be granted if the information can only be obtained through discovery. This argument is not persuasive. Although the court in Neubronner did comment that a balance should be achieved between preventing factually baseless allegations and the need for discovery, the case is inapposite to the facts present here. The Ninth Circuit has made clear that "[i]t is not sufficient for a plaintiff's pleadings to set forth a belief that certain unspecified sources will reveal, after appropriate discovery, facts that will validate [plaintiff's] claim." In re Silicon Graphics, 183 F.3d at 985. Because the complaint fails to specify all facts regarding Plaintiffs allegations, it lacks sufficient particularity to overcome the pleading requirements under the PSLRA.

Moreover, Plaintiffs' security claims fail to overcome the heightened pleading standard set forth under Fed. R. Civ. P. 9(b). The pleadings, for example, do not state the "who, what, when, where and how" of the alleged misconduct." Vess, 317 F.3d at 1106. Specifically, Plaintiffs do not disclose the meeting dates, who was at each meeting, what transpired at each meeting and where the meetings allegedly took place. Finally, the complaint gives no specificity as to the role each individual played in the alleged misrepresentations, but instead only generally lists all Defendants into each of the allegations. Without such information, the complaint fails to give each defendant sufficient notice "so that they can defend against the charge and not just deny that they have done anything wrong." Id.

b. Scienter

Defendant next argues that Plaintiffs do not plead sufficient facts to demonstrate a strong inference of scienter in their securities claim. Doc. No. 4 at 8. Defendants contend that plaintiffs fail to allege specific facts demonstrating that any alleged communications between

Defendants and Itochu were material, and fail to allege any facts demonstrating that Defendants deliberately misrepresented to Plaintiffs that they would pay for Plaintiff Blehm's tax liability. Id. at 10. Plaintiffs rebut these arguments, stating that "[s]cienter can be established by showing either conscious misbehavior, recklessness, or defendant's 'motive and opportunity' to defraud." Doc. No. 5 at 15 (citations omitted).

The PSLRA requires complaints alleging federal securities fraud to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). As recently interpreted by the Ninth Circuit, this language requires a private securities plaintiff to plead particular facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct. In re Silicon Graphics, 183 F.3d at 977, 979. Reckless conduct is defined as:

> [A] highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must be aware of it.

Id. at 976. Furthermore, the Ninth Circuit explicitly rejected the lesser standard of motive and opportunity or circumstantial evidence of simple recklessness as sufficient to meet the scienter requirements of the PSLRA. The Ninth Circuit found that plaintiffs can "no longer aver intent in general terms of mere 'motive and opportunity' or 'recklessness." In re Silicon Graphics, 183 F.3d at 979. Instead, a plaintiff "must state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent." Id. Thus, recklessness satisfies the scienter requirement only insofar as it reflects some degree of conscious or deliberate misconduct. Therefore, to the extent that Plaintiffs assert only "motive and opportunity" or recklessness without "some degree of conscious or deliberate misconduct," their allegations fall short of PSLRA's requirements. To meet the pleading requirements for scienter, Plaintiffs must "plead particular facts giving rise to a strong inference of deliberate recklessness." Id.

i. Company Sale

Plaintiffs allege in their complaint that Defendants "failed to disclose [] non-public material facts to [Plaintiffs] . . . with the intent to defraud and deceive [Plaintiffs], with the intent to induce [Plaintiffs] to enter into the Agreement, and with the intent to induce FDC to sell to DC all the shares of DC corporate stock held by FDC." Cplt. at 8. Defendants argue that the complaint does not sufficiently plead scienter because Plaintiffs fail to demonstrate that Defendants "deliberately omitted to disclose the existence of negotiations to sell DC shoes." Doc. No. 4 at 9.

It is well accepted that a corporate stock issuer "in possession of material nonpublic information, must, like other insiders in the same situation, disclose that information to its shareholders or refrain from trading with them." McCormick v. Fund Amer. Comp., Inc., 26 F.3d 869, 876 (9th Cir. 1994) (citations omitted). "In the case of an omission, '[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5.'" Id. at 875. Thus, to show scienter in a merger or company sale situation, a plaintiff must show that the information withheld was: 1) material; 2) defendant had a duty to disclose the information; and 3) defendant knowingly or recklessly to "a degree that strongly suggests actual intent" withheld that information. *See* In re Silicon Graphics, 183 F.3d at 979.

The Court finds that Plaintiffs do not meet these requirements in the instant complaint. As discussed above, Plaintiffs first allege that all Defendants collectively participated in the alleged negotiations without disclosing details of the alleged communications, who participated in the alleged talks and, when and where the alleged talks took place. In particular, Plaintiffs do not specifically point to individuals who were present during the alleged communications. Plaintiffs' conclusory assertions, thus, fail to comply "with the requirement that the complaint set forth as to 'each statement' particular facts giving rise to a strong inference of scienter as to *each* defendant." Allison v. Brooktree Corp., 999 F.Supp. 1342, 1351 (S.D. Cal. 1998) (emphasis added). Without such information, the complaint does not give fair notice to each defendant as to their alleged wrongdoings.

In addition, although Plaintiffs allege that Defendants had a duty to disclose the alleged communications between DC Shoes and potential buyers, the complaint does not disclose sufficient facts for the Court to determine whether the alleged information was material. The complaint does not disclose any specific facts as to the timing of the events in relation to when Plaintiffs signed the settlement agreement. Thus, this Court finds that Plaintiffs fail to meet the heightened requirements under the PSLRA for pleading scienter with regards to the omission of the alleged company sale.

ii. *Tax Payment*

Plaintiffs further allege that Defendants "knew they would enter into a settlement with the Internal Revenue Service . . . so that [Plaintiffs] would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC." Cplt. at 8. Plaintiffs argue that their reliance on Defendants' offer to pay the employment tax obligations induced Plaintiffs to enter into the settlement agreements. Id. Had they had this material information, Plaintiffs would have "demanded much higher compensation" for their stock. Doc. No. 5 at 17. Defendants rebut that Plaintiffs cannot show scienter because the alleged statements were not "deliberately misrepresented" by Defendants. Doc. No. 4 at 10.

As above, Plaintiffs fail to properly plead scienter in connection with Defendants' alleged misrepresentations regarding Plaintiff Blehm's tax liability. First, Plaintiffs allege that all Defendants collectively participated in the alleged negotiations with the Internal Revenue Service without disclosing details of the alleged communications, who participated in the alleged negotiations and, when and where the alleged talks took place. In particular, Plaintiffs do not specifically point to individuals who were present during the alleged talks with the Internal Revenue Service. Plaintiffs' conclusory assertions fail to comply "with the requirement that the complaint set forth as to 'each statement' particular facts giving rise to a strong inference of scienter as to *each* defendant." Allison v. Brooktree Corp., 999 F.Supp. 1342, 1351 (S.D. Cal. 1998) (emphasis added).

Accordingly, this Court finds that Plaintiffs have failed to properly plead particularity and scienter, and hereby DISMISSES Plaintiffs' first claim for securities fraud.

B. Non-Securities Act Claims [Plaintiff's Second, Third, Fourth, Eighth and Ninth Causes of Action]

a. Breach of Fiduciary Duty [Second Cause of Action]

Plaintiffs first argue that their second claim for breach of fiduciary duty "need not be pled with specificity." Doc. No. 5 at 7. Although fraud is not an essential element of a claim for breach of fiduciary duty, a claim may nonetheless "sound in fraud" if the claims, specifically allege fraud, or "alleg[e] facts that necessarily constitute fraud (even if the word 'fraud' is not used)." Vess, 317 F.3d at 1105.

> In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).

Id. at 1103-04.

Here, Plaintiff specifically alleges fraudulent activity in their second cause of action, pleading that "[a]s a proximate result of the fraud and deceit [by Defendants] . . . the Blehm parties have suffered damages. . . . Had the Blehm Parties known the true facts, . . . [they] would not have entered into the Agreement." Cplt. at 10. As such, Plaintiff's breach of fiduciary claim is subject to the heightened pleading requirements under Rule 9(b).

b. Second, Third, Fourth, Eighth and Ninth Causes of Action [Particularity Requirement]

In addition to Plaintiffs' contentions regarding their breach of fiduciary act claim, Plaintiffs also argue that Defendants impose a higher pleading standard to their non-securities act (Plaintiffs' second, third, fourth, eighth and ninth) claims than is required by Rule 9(b). Plaintiffs, for example, state that "F.R.C.P. 9(b) does not share the same scienter pleading requirements as the PSLRA." *See* Doc. No. 5 at 6. Plaintiffs also claim that "F.R.C.P. 9(b)'s pleading requirements for fraud . . . is less strict than one set by PSLRA." Id. at 8.

As mentioned above, the PSLRA adds the requirement that Plaintiff plead with particularity defendant's scienter in securities fraud actions only. Thus, Plaintiffs are correct in asserting that the non-securities fraud actions, including breach of fiduciary duty, intentional concealment, negligent failure to disclose, intentional misrepresentation and negligent misrepresentation are not subject to the more stringent requirements of the PSLRA.

However, fraud causes of action must be plead with particularity under Rule 9(b), whether or not it is grounded in securities fraud. Although Plaintiffs are correct by stating that Rule 9(b) and PSLRA are not identical, a complaint must still "set forth what is false or misleading about a statement, and why it is false . . . [and] why the statement or omission complained of was false or misleading." Yourish, 191 F.3d at 993. Rule 9(b), regardless of its application towards securities or other fraudulent claims, poses a heightened pleading standard to all fraud-based claims.

In reviewing Plaintiff's complaint, this Court finds that Plaintiffs' non-security fraud claims do not meet the heightened standard under Fed. R. Civ. P. 9(b). The pleadings, for example, do not state the "who, what, when, where and how" of the alleged misconduct. Vess, 317 F.3d at 1106. As discussed above, Plaintiffs do not disclose the meeting dates, who was at each meeting, what transpired at each meeting and where the meetings allegedly took place. Moreover, the complaint gives no specificity as to the individuals involved in the alleged misrepresentations, but instead generically lists all Defendants into each of the allegations.

Likewise, Plaintiffs' allegations regarding the misrepresentations of the IRS payment in the settlement agreement also lack sufficient specificity to overcome the particularity requirements of Fed. R. Civ. P. 9(b). Plaintiffs again fail to state the "who, what, when, where and how" of the alleged misconduct." Vess, 317 F.3d at 1106. For example, Plaintiffs do not disclose the alleged meeting dates between the IRS and Defendants, who was at each of the alleged meetings, what transpired at each meeting and where the meetings allegedly took place. Moreover, the complaint gives no specificity as to the individuals involved in the meetings with the IRS, but instead generically lists all Defendants into each of the allegations. Plaintiff instead states that "[Defendants] knew that they would enter into a settlement with the Internal Revenue Service" without stating any facts or information regarding the settlement or the alleged settlement meetings. Cplt. at 8. As discussed above, this lack of information does not meet the heightened particularity requirements of Fed. R. Civ. P. 9(b).

Therefore, for the reasons stated above, this Court finds that Plaintiffs' complaint fails to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b), and accordingly DISMISSES Plaintiffs' second (breach of fiduciary duty), third (intentional concealment), fourth (negligent failure to disclose), eighth (intentional misrepresentation) and ninth (negligent misrepresentation) claims for relief.

C. Loss Causation

Defendants finally argue that Plaintiffs do not allege the loss causation necessary to sustain their securities claims. Doc. No. 4 at 11. Specifically, Defendants argue that Plaintiffs' tax payment misrepresentation claim cannot support a theory of loss causation because Plaintiffs' action "is a breach of contract claim, not a securities fraud claim." Id. at 12. Plaintiffs disagree, contending that the complaint sufficiently alleges both economic loss and proximate causation. Doc. No. 5 at 18. Plaintiffs point to statements in the complaint that "'but for'" Defendants' "failure to disclose its intentions to pay only a small portion of the employment tax liability, not Blehm's individual liability, FDC would have retained its shares of DC corporate stock, and . . . received substantially greater consideration . . . by negotiating their own sale of DC corporate stock with Itochu or such other persons or entities." Id. at 18-19.

In order for a defendant's misrepresentation or omission to be actionable under Rule 10b-5, a plaintiff must demonstrate loss causation, or "a causal connection between the material misrepresentation and the loss." Dura Pharmaceuticals, Inc. v. Broudo, __ U.S. __, 125 S.Ct. 1627, 1631 (2005). Loss causation is "equivalent to proximate causation in tort." Binder v. Gillespie, 184 F.3d 1059, 1066 (9th Cir. 1999), quoting McGonigle v. Combs, 968 F.2d 810, 821 (9th Cir. 1992). To satisfy the requirement for loss causation, a plaintiff must show that the misrepresentation or omission directly caused, "or had something to do with" plaintiff's damages. Id; *see also* Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment, 189 F.3d 1017, 1027 (9th Cir. 1999).

In regards to the alleged tax liability misrepresentation, Plaintiffs claim they "would have received substantially greater consideration than they did under the Agreement by negotiating their own sale of DC corporate stock with Itochu or such other persons or entities." Cplt. at 9. It is not clear to this Court how Plaintiffs could receive "substantially greater consideration" had they declined to enter into the settlement agreement as a result of the alleged tax liability misrepresentation. The complaint does not disclose that Itochu or other third-party companies would have been interested in buying directly from Plaintiffs, or that such third-party companies would have been interested in buying DC Shoes stock if Plaintiffs did not sell their stock to Defendants as part of the settlement agreement. The pleadings, therefore, are missing a link connecting the event of the alleged tax liability misrepresentations together with any damages Plaintiffs may have incurred by not being able to sell directly to third-party companies, like Itochu.

Furthermore, the settlement agreement was entered into between the parties to resolve issues surrounding Plaintiffs' employment litigation, as well as FDC's dissolution litigation, which sought an involuntary dissolution of the company that Plaintiff held shares in. Cplt. at 5. It is, again, not clear to this Court how Defendants' alleged misrepresentations of paying Plaintiff Blehm's personal tax liability would be causally connected to Plaintiffs' ability to withhold selling its stock to DC Shoes and selling it directly to a third party. Instead, Plaintiffs options would have been to simply refuse to sign the Agreement, or try to bargain for increased compensation for settling the employment litigation and dissolution action if Defendants were not willing to contribute to the entire tax liability as Plaintiffs allege. Thus, even construing the factual allegations in a light most favorable to Plaintiffs, this Court can find no causal connection between Defendants' alleged misrepresentations regarding payment of Plaintiffs' tax liability and any securities loss they may have incurred. Accordingly, this Court finds that Plaintiffs fail to plead loss causation in regards to Plaintiff's alleged fraudulent activities related to tax liability, and GRANTS Defendants' motion to dismiss the first claim for securities.

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CONCLUSION AND ORDER

For the reasons stated above, **IT IS HEREBY ORDERED** that Defendants' motion to dismiss Plaintiffs' first (violation of the Securities and Exchange Act §10 and Rule 10b-5), second (breach of fiduciary duty), third (intentional concealment), fourth (negligent failure to disclose), eighth (intentional misrepresentation) and ninth (negligent misrepresentation) claim is **GRANTED** without prejudice.

IT IS SO ORDERED.

Dated: February 23, 2006

JOHN A. HOUSTON
United States District Judge

cc: Magistrate Judge McCurine
All Counsel of Record

U.S. District Court
Southern District of California
880 Front Street, Room 4290
San Diego, CA 92101-8900

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DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER AND MOTION TO STRIKE COMPLAINT

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

Lawrence G. Campitiello, Esq.
McColloch & Campitiello, LLP
5900 La Place Court, Suite 100
Carlsbad, CA 92008-8832

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 27, 2006, at Newport Beach, California.

[signature]
Linda Evington

PROOF OF SERVICE BY MAIL

FILED
NORTH COUNTY DIV.
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CLERK-SUPERIOR COURT
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Carlsbad, CA 92008-8832

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Linda Evington

NB1:696356.1

Exhibit 8

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Attorneys for plaintiffs
CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation;

Plaintiffs,

vs.

DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT, an individual; and DOES 1 through 25, inclusive,

Defendants.

Case No. GIN054897

COMPLAINT FOR BREACH OF FIDUCIARY DUTY, INTENTIONAL CONCEALMENT, NEGLIGENT FAILURE TO DISCLOSE, INJUNCTIVE RELIEF, SPECIFIC PERFORMANCE, BREACH OF WRITTEN CONTRACT, INTENTIONAL MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, RESCISSION, AND UNJUST ENRICHMENT

Plaintiffs, CLAYTON D. BLEHM ("Blehm"), CLAYTON BLEHM LIVING TRUST 1997 ("Blehm Trust"), and FDC INVESTMENTS, INC. ("FDC") (Blehm, Blehm Trust, and FDC are collectively referred to herein as "the Blehm Parties") allege:

GENERAL ALLEGATIONS

1. Blehm is, and at all times mentioned herein was, an individual residing and conducting business in North San Diego County, California.

2. Blehm Trust is, and at all times mentioned herein was, a living trust created under the laws of the State of California. Blehm is, and at all times mentioned herein was, a trustee of Blehm Trust.

3. FDC is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in North San Diego County, California. Blehm is, and at all times mentioned herein, was the chief executive officer of FDC. Blehm Trust is, and at all times mentioned herein was, the sole shareholder of FDC.

4. Defendant DC SHOES, INC. ("DC") is, and at all times mentioned herein was, a corporation organized and existing under the laws of the State of California with its principal place of business located in North San Diego County, California. At all times mentioned herein, DC was in the business of designing, manufacturing, and selling sports footwear, apparel, and related goods.

5. Defendant KENNETH BLOCK ("Block") is, and at all times mentioned herein was, an individual residing and working in North San Diego County, California. At all times mentioned herein, Block was an officer, director, and shareholder of DC.

6. Defendant DAMON WAY ("Way") is, and at all times mentioned herein was, an individual, residing and working in North San Diego County, California. At all times mentioned herein, Way was an officer and director of DC.

7. The Blehm Parties are informed and believe, and based upon their information and belief allege, that defendant THE DAMON WAY REVOCABLE LIVING TRUST U/A DATED MAY 20, 1999 ("Way Trust") is, and at all times mentioned herein was, a living trust created under the laws of the State of California. The Blehm Parties are informed and believe, and based upon their information and belief allege, that at all times mentioned herein, Way was a trustee of Way Trust. The Blehm Parties are further informed and believe, and based upon their

further information and belief allege, that at all times mentioned herein, Way Trust was a shareholder of DC.

8. The Blehm Parties are informed and believe, and based upon their information and belief allege, that defendant DC SHOES EMPLOYEE SHARE TRUST ("DC Trust") [1] is, and at all times mentioned herein was, an employee share trust created under the laws of the State of California and the laws of the United States. The Blehm Parties are informed and believe, and based upon their information and belief allege, that at all times prior to March 8, 2004, DC Trust was a shareholder of DC. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that at all times prior to March 8, 2004, Block and Way were trustees of DC Trust.

9. Defendant BRIAN WRIGHT ("Wright") is, and at all times mentioned herein was, an individual residing and working in North San Diego County, California. At all times mentioned herein, Wright was an officer of DC, its general counsel, and a shareholder of DC by virtue of his participation in DC Trust.

10. The events giving rise to this action occurred in North San Diego County, California. The causes of action set forth herein are money demands in excess of the jurisdictional minimum of this court.

11. The true names and capacities of defendants sued herein as Does 1 through 25, inclusive, are unknown to the Blehm Parties, and the Blehm Parties therefore sue those defendants by such fictitious names. The Blehm Parties will amend this complaint to allege their true names and capacities when ascertained. The Blehm Parties are informed and believe and thereon allege that each of the fictitiously named defendants is responsible for the injuries suffered by the Blehm Parties as hereinafter alleged.

12. The Blehm Parties are informed and believe, and based upon their information and belief allege, that at all times mentioned herein each of the defendants was the agent and

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[1] DC Trust is named herein as a perceived necessary party because DC Trust is a party to the Agreement identified in paragraph 18, et. seq., below. Plaintiffs are informed and believe that DC Trust no longer exists as a viable entity. As such, plaintiffs are open to dismissing DC Trust from this action provided defendants acknowledgment that DC Trust is no longer a necessary party.

employee of each of the remaining defendants and, in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.

13. The Blehm Parties are informed and believe, and based on their information and belief allege, that DOES 1 through 25, inclusive, are the alter egos of DC. The Blehm Parties are informed and believe, and based on their information and belief allege, that there exists a unity of interest and ownership between DOES 1 through 25, inclusive, and DC such that the individuality and separateness of DC has ceased. The Blehm Parties are informed and believe, and based on their information and belief allege, that DC is now a mere shell, instrumentality, and conduit through which DOES 1 through 25, inclusive, are conducting business. The Blehm Parties are informed and believe, and based on their information and belief allege, that the assets of DC have been commingled with the assets of DOES 1 through 25, inclusive. The Blehm Parties are further informed and believe, and based on their further information and belief allege, that to recognize DC as a separate entity would sanction a fraud or promote injustice because DOES 1 through 25, inclusive, have diverted the income, revenue, and profits of DC to themselves.

14. Blehm is the former Chief Financial Officer and a former corporate director of DC. FDC is the former owner of 3 million shares of stock in DC which, at the time, represented 30% of the issued and outstanding corporate stock of DC.

15. On June 30, 2002, Blehm was wrongfully terminated from his position as the Chief Financial Officer of DC by Block and Way. Blehm was terminated on the eve of the scheduled closing of a sale of DC to Billabong International Limited ("Billabong") for $130 million, plus possible purchase price enhancements. As the owner of 30% of the issued and outstanding corporate stock of DC at that time, FDC stood to receive in excess of $39 million from the sale of DC to Billabong. However, as a result of the wrongful termination of Blehm's employment by Block and Way, the sale of DC to Billabong did not close. The termination of Blehm's employment gave rise to a lawsuit entitled Blehm, et. al. v. DC Shoes, et. al., filed on October 1, 2002 in the San Diego Superior Court, North County Branch, docketed as Case No. GIN024468 ("the Employment Litigation").

16. Commencing after June 30, 2002, Block and Way, who were in control of DC at that time, knowingly countenanced persistent and pervasive fraud, mismanagement, abuse of authority, and persistent unfairness toward FDC, and misapplied and wasted the assets of DC, all in an effort to: (1) unjustly enrich themselves at the expense of Blehm and FDC; (2) prevent FDC from realizing any benefit from its ownership of DC stock; and (3) ultimately wrest complete control and ownership of DC in themselves, to the exclusion of all others. Among other things:

a. At the annual meeting of DC's shareholders, conducted on January 15, 2003, over FDC's objection, Block, Way, Way Trust, and DC Trust (controlled by Block and Way) approved several amendments to DC's bylaws designed to solidify Block and Way's control of DC and exclude FDC from exercising any authority over DC. Among other things, DC's restated bylaws were amended to provide that:

i. Any action requiring the approval of DC's shareholders may be taken without a shareholder meeting if written consent to the action is given by a majority of the holders of DC's outstanding shares. This change was enacted to replace DC's previous bylaw requirement that action requiring the approval of DC's shareholders may be taken without a shareholder meeting only if written consent was signed by all of the shareholders entitled to vote at such a meeting. Thus, Block and Way, were able to exercise complete control over DC without providing FDC even the opportunity to be heard at a meeting;

ii. The board of directors may appoint an executive committee, consisting of at least two directors, that may hold its own meetings and conduct business on behalf of the board without notice to non-committee board members. DC's previous bylaws did not authorize the establishment of an executive committee. At this same annual meeting of shareholders, Block, Way, Way Trust, and DC Trust (controlled by Block and Way), voted to appoint Block and Way as the only members of the executive committee. Thus, this change was enacted to effectively exclude Blehm from participating in the decisions of the board; and

iii. DC must indemnify its directors and officers. DC's previous bylaws did not contain any provision regarding indemnification of the corporation's directors and officers. This change was enacted so that Block and Way could pass onto DC the expense of defending the Employment Litigation brought against them personally by Blehm.

b. At the annual meeting of DC's board of directors, conducted on January 15, 2003, over Blehm's objection, Block and Way voted to essentially quadruple the base salaries payable to each of them as officers of DC. The base salaries which Block and Way approved for themselves were an exorbitant waste of DC's assets, were not commensurate with the level of education and experience possessed by Block and Way, were well above the base salaries of similarly situated officers in DC's industry, and were not justifiable, particularly given the lack of attendance to DC business exhibited by Block and Way. Indeed, the increased base salaries which Block and Way approved for themselves were approximately four times that of DC's chief executive officer, an individual with extensively more education, experience, and qualifications than Block and Way.

c. At the annual meeting of DC's board of directors, conducted on January 15, 2003, Block and Way admitted that DC was providing each of them with four (4) luxury vehicles for their use. This was a blatant waste of corporate assets.

d. At the annual meeting of DC's board of directors, conducted on January 15, 2003, it was confirmed that DC had tens of millions of dollars in retained earnings. Despite this surplus of earnings, Block and Way failed and refused to declare a dividend to shareholders, so as to exclude FDC from the benefits of its stock ownership. Instead, Block and Way paid "constructive dividends" to themselves in the form of exorbitant salaries and bonuses, as described above, to the exclusion of FDC.

e. In or about January 2003, Block and Way issued press releases touting the establishment of a multi-acre "Mountain Lab" in Park City, Utah, a site purportedly owned by DC for the testing and development of DC's products. Plaintiffs are informed and believe that DC assets were used to develop and improve the multi-million dollar "Mountain Lab" property when, in fact, title to the "Mountain Lab" property was actually held by Block and the facility was utilized by him as his personal residence. Block and Way developed the "Mountain Lab" without presenting the concept or the anticipated expenses associated therewith, to DC's shareholders or DC's board of directors for approval.

f. Block and Way utilized DC's assets for their personal benefit, including improvements to their personal residences, purchases and maintenance of cars, boats, motorcycles, and equipment, purchases of artwork, furniture, musical instruments, and electronic equipment, and expenditures for personal trainers, trips, and private parties, all totaling hundreds of thousands of dollars.

g. After January 15, 2003, Block and Way refused to provide FDC and Blehm access to information and documents they were entitled to receive as a shareholder and director, respectively, of DC. Among other things, Block and Way refused to provide FDC and Blehm with DC's 2002 year end financial statement, minutes from the shareholders and directors meetings conducted January 15, 2003, and financial information related to payroll and employee bonuses and loan accounts. Block and Way denied access to this information to FDC and Blehm in furtherance of their scheme to unjustly enrich themselves with the assets of DC at FDC's expense.

h. After June 30, 2002, Block and Way also modified the accounting system previously put in place by Blehm at DC, in order to make it more difficult for Blehm to review Block's and Way's individual financial dealings with DC.

i. On or about February 14, 2003, Block and Way filed a cross-complaint in the Employment Litigation, on behalf of themselves and DC, seeking, among other things, the rescission of all DC corporate stock issued to FDC.

j. Plaintiffs are informed and believe that, after June 30, 2002, Block and Way engaged in the systematic and spiteful firing of DC employees having relationships to Blehm. In doing so, Block and Way wasted corporate assets by terminating valuable employees for no reason other than their relationship to Blehm. Block and Way then further wasted corporate assets by replacing those valuable employees with incompetent and untrustworthy replacements. In one instance, a replacement employee hired by Block and Way embezzled $50,000 cash from DC. The embezzlement was due, at least in part, to mismanagement of DC's accounting department by Block and Way. Plaintiffs are informed and believe that, after June 30, 2002, Block and Way also terminated employees based on discriminatory factors, including age and disability. In doing so, Block and Way exposed DC to legal proceedings brought by the individuals wrongfully terminated and discriminated against.

k. Plaintiffs are informed and believe that, after June 30, 2002, Block and Way engaged in the systematic firing of DC employees having a contingent interest in the DC Trust, for the purpose of eliminating those contingent interests. Plaintiffs are informed and believe that, in one instance, Block and Way terminated substantially all of DC's warehouse, shipping, and receiving staff for the purpose of substantially reducing the number of employees eligible to participate in the DC Trust. Plaintiffs are further informed and believe that ultimately, in or about February 2004, Block and Way dissolved the DC Trust in its entirety, in anticipation of the sale of DC to Quiksilver, Inc. ("Quiksilver"). Plaintiffs are further informed and believe that Block and Way dissolved the DC Trust in order to eliminate all other ownership interests in DC besides their own, so that only they would share in the proceeds of the sale of DC to Quiksilver.

17. On March 13, 2003, FDC initiated an action for, among other things, the involuntary dissolution of DC, entitled FDC, et. al, vs. DC Shoes, et.al., in the San Diego Superior Court, North County Branch, docketed as Case No. GIN028361 ("the Dissolution Litigation").

18. On May 16, 2003, the Blehm Parties met with a representative of Bear Stearns who voiced an interest in purchasing DC. After that meeting, the Blehm Parties felt it was appropriate to pursue further discussions with Bear Stearns concerning the possible sale of DC. Indeed, plaintiffs are informed and believe that Bear Sterns scheduled a subsequent meeting with Block and Way to discuss its possible acquisition of DC. However, plaintiffs are informed and believe that when Bear Stearns contacted Block and Way to confirm their scheduled meeting, and when Bear Stearns informed Block and Way that it had conducted a successful meeting with the Blehm Parties, Block and Way canceled their meeting with Bear Stearns, simply because Bear Stearns had initially communicated with the Blehm Parties.

19. On or about August 20, 2003, the Blehm Parties, on the one hand, and DC, Block, Way, Way Trust, and DC Trust (collectively referred to as "the DC Parties"), on the other hand, entered into a written Settlement Agreement and Release ("the Agreement") to resolve, among other things, the Employment Litigation and the Dissolution Litigation. A true and correct copy of the Agreement is attached hereto, marked Exhibit "A," and incorporated herein by reference. As an officer of DC and DC's general counsel, Wright negotiated terms of the Agreement on behalf of the DC Parties with their full authorization and consent.

20. The material terms of the Agreement provided that the DC Parties would pay $10.5 million to the Blehm Parties to resolve the Employment Litigation and the Dissolution Litigation, as well as other consideration. The material terms of the Agreement also provided that FDC would sell to DC all the shares of DC corporate stock held by FDC for the sum of $4.5 million.

21. Among the items of other consideration that the DC Parties agreed to pay to the Blehm Parties was an agreement that DC "shall acknowledge and agree that (i) the claim made by the Internal Revenue Service for unpaid taxes relating to Blehm's prior employment with DC Shoes, in the approximate amount of $1,800,000, plus all applicable interest and penalties (the "IRS Claim") is the sole responsibility of DC Shoes, and (ii) none of the [Blehm] Parties shall have any liability or obligation to DC Shoes in connection with the IRS Claim." (Paragraph 5 of the Agreement.) The basis for the IRS Claim was a determination by the Internal Revenue Service in early 2002 that, at all times during his association with DC, Blehm was an employee of DC rather than an independent contractor engaged through FDC and, thus, employment withholding taxes should have been paid by DC for the entire period of Blehm's association with DC.

22. As described below, despite their entry into the Agreement on or about August 20, 2003, Block and Way continued to commit fraud against the Blehm Parties in an effort to unjustly enrich themselves at the expense of the Blehm Parties.

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FIRST CAUSE OF ACTION

(Breach of Fiduciary Duty against the DC Parties, Wright, and DOES 1 through 25, inclusive)

23. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 22 of this complaint as though fully set forth here.

24. On or about August 20, 2003, at the time DC purchased FDC's shares of DC corporate stock, DC was under a duty to disclose to the Blehm Parties any and all material non-public information in its possession.

25. As the persons controlling DC, and as the persons negotiating and implementing DC's purchase of DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 25, inclusive, were likewise under a duty to disclose to the Blehm Parties any and all material non-public information in their possession on or about August 20, 2003, at the time DC purchased FDC's shares of DC corporate stock.

26. At all times mentioned herein, Block and Way were corporate directors of DC and, as such, owed further duties of care and loyalty to FDC, as a shareholder of DC and, prior to August 20, 2003, to Blehm as a fellow director of DC.

27. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, breached their fiduciary duties to FDC and Blehm by failing to disclose to the Blehm Parties material non-public information. Specifically, on or about August 20, 2003, at the time DC purchased FDC's shares of DC corporate stock, the DC Parties, Wright, and DOES 1 through 25, inclusive, failed to disclose to the Blehm Parties that they were negotiating terms to sell DC to a company by the name of Itochu. Indeed, at a negotiation session on June 25, 2003, Wright affirmatively represented to the Blehm Parties and their counsel that "DC needed to find a buyer" before it could pay the Blehm Parties the amounts ultimately stated in the Agreement – implying that DC was not presently negotiating with any prospective buyers. The Blehm Parties are informed and believe, and based upon their information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, also breached their fiduciary duties to FDC and Blehm by failing to disclose to the Blehm Parties that they were also negotiating terms to sell DC to other persons or entities in addition to Itochu.

28. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 25, inclusive, concealed these non-public material facts from the Blehm Parties, and when Wright made his affirmative representation, they knew that they were in possession of material non-public information that they were required to disclose to the Blehm Parties. The Blehm Parties are informed and believe, and based upon their information and belief allege, that instead, the DC Parties, Wright, and DOES 1 through 25, inclusive, concealed the material non-public information from the Blehm Parties in order to induce the Blehm Parties to enter into the Agreement, and to induce FDC to sell to DC all the shares of DC corporate stock held by FDC for the sum of $4.5 million. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that the DC Parties, Wright, and DOES 1 through 25, inclusive, induced the Blehm Parties to enter into the Agreement, and induced FDC to sell its shares of DC corporate stock to DC, so that the DC Parties, Wright, and DOES 1 through 25, inclusive, could complete the sale of their shares of DC corporate stock to other persons or entities, to the exclusion of the Blehm Parties, and realize a profit for themselves that was much greater than the $4.5 million paid to FDC under the Agreement.

29. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its DC corporate stock to DC, the Blehm Parties were unaware of the nondisclosure of non-public material facts by the DC Parties, Wright, and DOES 1 through 25, inclusive, and believed there was full disclosure of all material facts. In reliance on the non-disclosure by the DC Parties, Wright, and DOES 1 through 25, inclusive, the Blehm Parties were induced to and did enter into the Agreement and sold to DC all the shares of DC corporate stock held by FDC for the sum of $4.5 million. The Blehm Parties did not discover the true facts until on or about February 16, 2005, when the Blehm Parties learned that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 25, inclusive, were negotiating terms to sell DC to Itochu.

30. As a proximate result of the fraud and deceit and breach of fiduciary duties by the DC Parties, Wright, and DOES 1 through 25, inclusive, the Blehm Parties have suffered damages

in that they entered into the Agreement and sold all the shares of DC corporate stock held by FDC at a much lower value than the shares were worth. Had the Blehm Parties known the true facts, that the DC Parties, Wright, and DOES 1 through 25, inclusive, were negotiating terms to sell DC to Itochu and other persons or entities, the Blehm Parties would not have entered into the Agreement. Instead, FDC would have retained its shares of DC corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by participating in the sale of DC corporate stock to Itochu or other persons or entities.

31. On or about March 8, 2004, DC was indeed sold to Quiksilver. The Blehm Parties are informed and believe, and based on their information and belief allege, that as a result of the sale of DC to Quiksilver, the DC Parties, Wright, and DOES 1 through 25, inclusive, received a considerably greater amount for their DC corporate stock than FDC received for its DC corporate stock under the Agreement. The exact amount of the Blehm Parties' loss has not yet been ascertained. However, the Blehm Parties are informed and believe, and based on their information and belief allege, that the difference between the price paid to FDC by DC for its shares of DC corporate stock ($4.5 million), and the price received by the DC Parties, Wright, and DOES 1 through 25, inclusive, for their shares of DC corporate stock from Quiksilver, is tens of millions of dollars.

32. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, also affirmatively represented to the Blehm Parties, through their legal representative Wright, that if the Blehm Parties entered into the Agreement, and if FDC sold all its shares of DC corporate stock to DC, then the DC Parties would pay all taxes, penalties, and interest owing to the Internal Revenue Service relating to Blehm's prior employment with DC. Indeed, as the legal representative of the DC Parties, on or about July 11, 2003, Wright affirmatively represented to the attorney for the Blehm Parties, Richard L. Kintz, Esq., that after taking into consideration the taxes, penalties, and interest that DC would pay to the Internal Revenue Service on behalf of the Blehm Parties, as well as other consideration intended under the Agreement, the Blehm Parties would effectively receive consideration valued at $19 million,

rather than the $15 million specified in the Agreement. These representations were likewise material to the Blehm Parties' decision to sell the shares of DC corporate stock held by FDC to DC for the purchase price set forth in the Agreement. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 25, inclusive, they knew the representations to be false, in that, they knew the DC Parties had no intention of paying the taxes, penalties, and interest (in the approximate amount of $1.8 million) owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On the contrary, at the time these representations were made, the DC Parties, Wright, and DOES 1 through 25, inclusive knew that they would enter into a settlement with the Internal Revenue Service pursuant to Internal Revenue Code §3509, so that the Blehm Parties would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC.

33. The Blehm Parties are informed and believe and based upon their information and belief allege, that the conduct of the DC Parties, Wright, and DOES 1 through 25, inclusive, was an intentional misrepresentation and an intentional concealment of material non-public facts known to the DC Parties, Wright, and DOES 1 through 25, inclusive, done with the intention on their part to deprive the Blehm Parties of property and legal rights causing injury, and was despicable conduct that subjected the Blehm Parties to cruel and unjust hardship in conscious disregard of the rights of the Blehm Parties, so as to justify an award of exemplary and punitive damages.

SECOND CAUSE OF ACTION

(Intentional Concealment against the DC Parties, Wright, and DOES 1 through 25, inclusive)

34. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 33 of this complaint as though fully set forth here.

35. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its shares of DC corporate stock to DC, the DC Parties, Wright, and DOES 1 through 25, inclusive, were under a duty to disclose to the Blehm Parties any and all material non-public information in their possession.

36. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, concealed material non-public information from the Blehm Parties. Specifically, at the time DC purchased FDC's shares of DC corporate stock, the DC Parties, Wright, and DOES 1 through 25, inclusive, failed to disclose to the Blehm Parties that they were negotiating terms to sell DC to a company by the name of Itochu. Indeed, at a negotiation session on June 25, 2003, Wright affirmatively represented to the Blehm Parties and their counsel that "DC needed to find a buyer" before it could pay the Blehm Parties the amounts ultimately stated in the Agreement – implying that DC was not presently negotiating with any prospective buyers. The Blehm Parties are informed and believe, and based upon their information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, also breached their fiduciary duties to FDC and Blehm by failing to disclose to the Blehm Parties that they were also negotiating terms to sell DC to other persons or entities.

37. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, also affirmatively represented to the Blehm Parties, through their legal representative Wright, that if the Blehm Parties entered into the Agreement, and if FDC sold all its shares of DC corporate stock to DC, then the DC Parties would pay all taxes, penalties, and interest owing to the Internal Revenue Service relating to Blehm's prior employment with DC. Indeed, as the legal representative of the DC Parties, on or about July 11, 2003, Wright affirmatively represented to the attorney for the Blehm Parties, Richard L. Kintz, Esq., that after taking into consideration the taxes, penalties, and interest that DC would pay to the Internal Revenue Service on behalf of the Blehm Parties, as well as other consideration intended under the Agreement, the Blehm Parties would effectively receive consideration valued at $19 million, rather than the $15 million specified in the Agreement. These representations were likewise material to the Blehm Parties' decision to sell the shares of DC corporate stock held by FDC to DC for the purchase price set forth in the Agreement. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 25, inclusive, they knew the representations to be false, in that, they knew the DC Parties had no intention of paying the taxes, penalties, and interest (in the approximate amount of $1.8 million) owing to the Internal Revenue

Service relating to Blehm's prior employment with DC. On the contrary, at the time these representations were made, the DC Parties, Wright, and DOES 1 through 25, inclusive knew that they would enter into a settlement with the Internal Revenue Service pursuant to Internal Revenue Code §3509, so that the Blehm Parties would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC.

38. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 25, inclusive, made these representations and concealed these non-public material facts from the Blehm Parties, they knew that the representations were false and that they were in possession of material non-public information that they were required to disclose to the Blehm Parties. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties, Wright, and DOES 1 through 25, inclusive, made these representations and concealed the material non-public information from the Blehm Parties in order to induce the Blehm Parties to enter into the Agreement, and to induce FDC to sell to DC all the shares of DC corporate stock held by FDC for the sum of $4.5 million. The Blehm Parties are further informed and believe, and based upon their further information and belief allege, that the DC Parties, Wright, and DOES 1 through 25, inclusive, induced the Blehm Parties to enter into the Agreement, and induced FDC to sell its shares of DC corporate stock to DC for $4.5 million, so that the DC Parties, Wright, and DOES 1 through 25, inclusive, could complete the sale of their shares of DC corporate stock to others, to the exclusion of the Blehm Parties, and realize a profit for themselves that was much greater than the amount paid of $4.5 million to FDC under the Agreement.

39. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its DC corporate stock to DC, the Blehm Parties were unaware of the falsity of the representations and the nondisclosure of non-public material facts by the DC Parties, Wright, and DOES 1 through 25, inclusive, and believed the representations to be true and believed there was full disclosure of all material facts. In reliance on the representations and non-disclosure by the DC Parties, Wright, and DOES 1 through 25, inclusive, the Blehm Parties were induced to and

did enter into the Agreement and sold to DC all the shares of DC corporate stock held by FDC for the sum of $4.5 million. The Blehm Parties did not discover the true facts until on or about February 16, 2005, when the Blehm Parties learned that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 25, inclusive, were negotiating terms to sell DC to Itochu.

40. As a proximate result of the fraud and deceit by the DC Parties, Wright, and DOES 1 through 25, inclusive, the Blehm Parties have suffered damages in that they entered into the Agreement and sold all the shares of DC corporate stock held by FDC at a much lower value than the shares were worth. Had the Blehm Parties known the true facts, that the DC Parties had no intention of paying to the Internal Revenue Service the taxes relating to Blehm's employment, and that the DC Parties, Wright, and DOES 1 through 25, inclusive, were negotiating terms to sell DC to Itochu and other persons or entities, the Blehm Parties would not have entered into the Agreement. Instead, FDC would have retained its shares of DC corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by participating in the sale of DC corporate stock to Itochu or other persons or entities.

41. The Blehm Parties are informed and believe, and based on their information and belief allege, that as a result of the sale of DC to Quiksilver on or about March 8, 2004, the DC Parties, Wright, and DOES 1 through 25, inclusive, received a considerably greater amount for their DC corporate stock than the $4.5 million FDC received for its DC corporate stock under the Agreement. The exact amount of the Blehm Parties' loss has not yet been ascertained. However, the Blehm Parties are informed and believe, and based on their information and belief allege, that the difference between the $4.5 million paid to FDC by DC for its shares of DC corporate stock, and the price received by the DC Parties, Wright, and DOES 1 through 25, inclusive, for their shares of DC corporate stock, is tens of millions of dollars.

42. The Blehm Parties are informed and believe and based upon their information and belief allege, that the conduct of the DC Parties, Wright, and DOES 1 through 25, inclusive, was an intentional misrepresentation and an intentional concealment of a material non-public fact

known to the DC Parties, Wright, and DOES 1 through 25, inclusive, done with the intention on their part to deprive the Blehm Parties of property and legal rights causing injury, and was despicable conduct that subjected the Blehm Parties to cruel and unjust hardship in conscious disregard of the rights of the Blehm Parties, so as to justify an award of exemplary and punitive damages.

THIRD CAUSE OF ACTION

(Negligent Failure to Disclose against the DC Parties, Wright, and DOES 1 through 25, inclusive)

43. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 42 of this complaint as though fully set forth here.

44. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its shares of DC corporate stock to DC, the DC Parties, Wright, and DOES 1 through 25, inclusive, were under a duty to disclose to the Blehm Parties any and all material non-public information in their possession.

45. As the persons controlling DC, and as the persons negotiating and implementing DC's purchase of DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 25, inclusive, were under a duty to disclose to the Blehm Parties any and all material non-public information in their possession at the time DC purchased FDC's shares of DC corporate stock.

46. At all times mentioned herein, Block and Way were corporate directors of DC and, as such, owed further duties of care and loyalty to FDC, as a shareholder of DC and, prior to August 20, 2003, to Blehm as a fellow director of DC.

47. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, failed to disclose material non-public information to the Blehm Parties. Specifically, at the time DC purchased FDC's shares of DC corporate stock, the DC Parties, Wright, and DOES 1 through 25, inclusive, failed to disclose to the Blehm Parties that they were negotiating terms to sell DC to a company by the name of Itochu. The Blehm Parties are informed and believe, and based upon their information and belief allege, that on or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, also breached their fiduciary duties to FDC and

Blehm by failing to disclose to the Blehm Parties that they were also negotiating terms to sell DC to other persons or entities.

48. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, also affirmatively represented to the Blehm Parties, through their legal representative Wright, that if the Blehm Parties entered into the Agreement, and if FDC sold all its shares of DC corporate stock to DC, then the DC Parties would pay all taxes, penalties, and interest owing to the Internal Revenue Service relating to Blehm's prior employment with DC. Indeed, as the legal representative of the DC Parties, on or about July 11, 2003, Wright affirmatively represented to the attorney for the Blehm Parties, Richard L. Kintz, Esq., that after taking into consideration the taxes, penalties, and interest that DC would pay to the Internal Revenue Service on behalf of the Blehm Parties, as well as other consideration intended under the Agreement, the Blehm Parties would effectively receive consideration valued at $19 million, rather than the $15 million specified in the Agreement. These representations were likewise material to the Blehm Parties' decision to sell the shares of DC corporate stock held by FDC to DC for the purchase price set forth in the Agreement. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 25, inclusive, they knew the representations to be false, in that, they knew the DC Parties had no intention of paying the taxes, penalties, and interest (in the approximate amount of $1.8 million) owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On the contrary, at the time these representations were made, the DC Parties, Wright, and DOES 1 through 25, inclusive knew that they would enter into a settlement with the Internal Revenue Service pursuant to Internal Revenue Code §3509, so that the Blehm Parties would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC.

49. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 25, inclusive, made these representations and failed to disclose these non-public material facts to the Blehm Parties, they knew or reasonably should have known that they were in possession of material non-public information that they were required to disclose to the Blehm Parties.

50. At the time the Blehm Parties entered into the Agreement, and at the time FDC sold its DC corporate stock to DC, the Blehm Parties were unaware of the falsity of the representations and nondisclosure of non-public material facts by the DC Parties, Wright, and DOES 1 through 25, inclusive, and believed the representations and believed there was full disclosure of all material facts. In reliance on the representations and non-disclosure by the DC Parties, Wright, and DOES 1 through 25, inclusive, the Blehm Parties were induced to and did enter into the Agreement and sold to DC all the shares of DC corporate stock held by FDC for the sum of $4.5 million. The Blehm Parties did not discover the true facts until on or about February 16, 2005, when the Blehm Parties learned that, at the time DC purchased DC corporate stock from FDC, the DC Parties, Wright, and DOES 1 through 25, inclusive, were negotiating terms to sell DC to Itochu.

51. As a proximate result of the misrepresentations and the failure of the DC Parties, Wright, and DOES 1 through 25, inclusive, to disclose material non-public information, the Blehm Parties have suffered damages in that they entered into the Agreement and sold all the shares of DC corporate stock held by FDC at a much lower value than the shares were worth. Had the Blehm Parties known the true facts, that the DC Parties were negotiating terms to sell DC to Itochu and other persons or entities, the Blehm Parties would not have entered into the Agreement. Instead, FDC would have retained its shares of DC corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by participating in the sale of DC corporate stock to Itochu or other persons or entities.

52. The Blehm Parties are informed and believe, and based on their information and belief allege, that as a result of the sale of DC to Quiksilver on or about March 8, 2004, the DC Parties, Wright, and DOES 1 through 25, inclusive, received a considerably greater amount for their DC corporate stock than FDC received for its DC corporate stock under the Agreement. The exact amount of the Blehm Parties' loss has not yet been ascertained. However, the Blehm Parties are informed and believe, and based on their information and belief allege, that the difference between the $4.5 million paid to FDC by DC for its shares of DC corporate stock, and

the price received by the DC Parties, Wright, and DOES 1 through 25, inclusive, for their shares of DC corporate stock, is tens of millions of dollars.

FOURTH CAUSE OF ACTION

(Injunctive Relief against the DC Parties)

53. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 52 of this complaint as though fully set forth here.

54. The Blehm Parties are informed and believe, and based on their information and belief allege, that as part of the sale of DC to Quiksilver on or about March 8, 2004, the DC Parties received consideration from Quiksilver that included shares of stock in Quiksilver.

55. The Blehm Parties have suffered and will continue to suffer great and irreparable injury if the DC Parties are permitted to retain those shares of Quiksilver stock that would have been received by the Blehm Parties but for the fraud and deceit of the DC Parties, Wright, and DOES 1 through 25, inclusive, as alleged above.

56. The Blehm Parties have no adequate remedy at law for their injuries, because Quiksilver stock is unique, and its exact value is difficult to calculate.

57. There is a reasonable probability that the Blehm Parties will prevail on the merits of their claims.

58. Accordingly, the Blehm Parties are entitled to a mandatory injunction requiring the DC Parties to transfer to the Blehm Parties those shares of Quiksilver stock held by the DC Parties that would have been received by the Blehm Parties but for the fraud and deceit of the DC Parties, Wright, and DOES 1 through 25, inclusive, as alleged above.

FIFTH CAUSE OF ACTION

(Specific Performance against the DC Parties)

59. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 58 of this complaint as though fully set forth here.

60. The Blehm Parties have performed all conditions, covenants and promises required to be performed by them in accordance with the terms and conditions of the Agreement.

61. The consideration given by the Blehm Parties under the Agreement was fair and reasonable. At the time the Agreement was entered into, its terms were just and reasonable as to the DC Parties.

62. The DC Parties have failed and refused to perform their obligations under the Agreement to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC, and to assure that none of the Blehm Parties would have any liability or obligation to the Internal Revenue Service for the taxes, interest, and penalties relating to Blehm's prior employment with DC.

63. The Blehm Parties have no adequate legal remedy in that damages, if awarded, will not compensate the Blehm Parties for their time, energy, and expenses in defending themselves against the IRS Claim if it is not paid by the DC Parties.

SIXTH CAUSE OF ACTION

(Breach of Written Contract against the DC Parties)

64. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 63 of this complaint as though fully set forth here.

65. The Blehm Parties have performed all conditions, covenants and promises required to be performed by them in accordance with the terms and conditions of the Agreement.

66. The Blehm Parties have requested that the DC Parties fulfill their obligations pursuant to paragraph 5 of the Agreement by paying the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC. The DC Parties have breached the Agreement and failed and refused, and continue to fail and refuse, to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

67. As a direct result of the DC Parties' breach, the Blehm Parties have suffered damages in the amount of approximately $2.2 million, representing the amount now being demanded from the Blehm Parties by the Internal Revenue Service for taxes, interest, and penalties relating to Blehm's prior employment with DC.

68. As part of the Agreement, the DC Parties agreed to pay reasonable attorney's fees incurred by the Blehm Parties in any action brought to enforce or interpret the Agreement. (Paragraph 15.6 of the Agreement.) Accordingly, the Blehm Parties are entitled to recover reasonable attorney's fees incurred in bringing and prosecuting this action.

SEVENTH CAUSE OF ACTION

(Intentional Misrepresentation against the DC Parties, Wright, and DOES 1 through 25, inclusive)

69. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 68 of this complaint as though fully set forth here.

70. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, falsely and fraudulently represented to the Blehm Parties that the DC Parties would be solely responsible for payment of the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On or about August 20, 2003, the DC Parties further falsely and fraudulently represented to the Blehm Parties that none of the Blehm Parties would have any liability or obligation for the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

71. The representations made by the DC Parties, Wright, and DOES 1 through 25, inclusive, were in fact false. The truth was that the DC Parties never intended to be solely responsible for the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC, and the DC Parties never intended to assure that none of the Blehm Parties would have any liability or obligation to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC. In fact, the Blehm Parties are informed and believe, and based upon their information and belief allege, that instead, the DC Parties intended to enter into a separate settlement with the Internal Revenue Service to the exclusion of the Blehm Parties, whereby the Internal Revenue Service would continue to seek payment of taxes, interest, and penalties relating to Blehm's prior employment with DC from the Blehm Parties.

72. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 25, inclusive, made their representations, they knew them to be false. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties, Wright, and DOES 1 through 25, inclusive, made these representations with the intent to defraud and deceive the Blehm Parties and with the intent to induce the Blehm Parties to enter into the Agreement and deliver consideration to the DC Parties pursuant to the Agreement.

73. At the time these representations were made by the DC Parties, Wright, and DOES 1 through 25, inclusive, and at the time the Blehm Parties entered into the Agreement, the Blehm Parties were unaware of the falsity of the representations made by the DC Parties, Wright, and DOES 1 through 25, inclusive, and believed them to be true. In reliance on the representations of the DC Parties, Wright, and DOES 1 through 25, inclusive, the Blehm Parties were induced to and did agree to enter into the Agreement and deliver consideration to the DC Parties pursuant to the Agreement.

74. The Blehm Parties did not discover the true facts until on or about January 3, 2005, when the DC Parties rejected the Blehm Parties' demand that the DC Parties pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

75. As a proximate result of the fraud and deceit of the DC Parties, Wright, and DOES 1 through 25, inclusive, and the facts alleged herein, the Blehm Parties have suffered damages in excess of $2,200,000, representing the amount now being demanded from the Blehm Parties by the Internal Revenue Service for taxes, interest, and penalties relating to Blehm's prior employment with DC.

76. The Blehm Parties are informed and believe and based upon their information and belief allege, that the conduct of the DC Parties, Wright, and DOES 1 through 25, inclusive, was an intentional misrepresentation of material fact known to the DC Parties, Wright, and DOES 1 through 25, inclusive, made with the intention on their part to deprive the Blehm Parties of property and legal rights causing injury, and was despicable conduct that subjected the Blehm

Parties to cruel and unjust hardship in conscious disregard of the Blehm Parties' rights, so as to justify an award of exemplary and punitive damages.

EIGHTH CAUSE OF ACTION

(Negligent Misrepresentation against the DC Parties, Wright, and DOES 1 through 25, inclusive)

77. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 76 of this complaint as though fully set forth here.

78. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, represented to the Blehm Parties that the DC Parties would be solely responsible for payment of taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC. On or about August 20, 2003, the DC Parties, Wright, and DOES 1 through 25, inclusive, further represented to the Blehm Parties that none of the Blehm Parties would have any liability or obligation to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

79. The representations made by the DC Parties, Wright, and DOES 1 through 25, inclusive, were in fact false. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties never intended to be solely responsible for payment of the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC, and never intended to assure that none of the Blehm Parties would have any liability or obligation to pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

80. The Blehm Parties are informed and believe, and based upon their information and belief allege, that when the DC Parties, Wright, and DOES 1 through 25, inclusive, made these representations, they had no reasonable ground for believing them to be true. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties, Wright, and DOES 1 through 25, inclusive, made these representations with the intent to induce the Blehm Parties to act in the manner herein alleged.

81. The Blehm Parties, at the time these representations were made by the DC Parties, Wright, and DOES 1 through 25, inclusive, and at the time the Blehm Parties entered into the Agreement, were unaware of the falsity of the representations and believed them to be true. In reliance on the representations of the DC Parties, Wright, and DOES 1 through 25, inclusive, the Blehm Parties were induced to and did agree to enter into the Agreement and deliver consideration to the DC Parties pursuant to the Agreement.

82. The Blehm Parties did not discover the true facts until on or about January 3, 2005, when the DC Parties rejected the Blehm Parties' demand that the DC Parties pay the taxes, interest, and penalties owing to the Internal Revenue Service relating to Blehm's prior employment with DC.

83. As a proximate result of the fraud and deceit of the DC Parties, Wright, and DOES 1 through 25, inclusive, and the facts alleged herein, the Blehm Parties have suffered damages in excess of $2,200,000, representing the amount now being demanded from the Blehm Parties by the Internal Revenue Service for payment of taxes, interest, and penalties relating to Blehm's prior employment with DC.

NINTH CAUSE OF ACTION

(Rescission against the DC Parties)

84. The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 83 of this complaint as though fully set forth here.

85. In the alternative, the Blehm Parties seek to rescind the Agreement based on the fraud committed by the DC Parties, Wright, and DOES 1 through 25, inclusive, as alleged herein.

86. The Blehm Parties will suffer substantial harm and injury under the Agreement if it is not rescinded. As a result of the conduct of the DC Parties, Wright, and DOES 1 through 25, inclusive, the Blehm Parties will be deprived of their bargain in that, had the Blehm Parties known the true facts, that the DC Parties were negotiating terms to sell DC to Itochu and other persons or entities, based on the Blehm Parties information and belief, the Blehm Parties would not have entered into the Agreement. Instead, FDC would have retained its shares of DC

corporate stock, and the Blehm Parties would have received substantially greater consideration than they did under the Agreement by participating in the sale of DC corporate stock to Itochu or other persons or entities.

87. The Blehm Parties intend service of the summons and complaint in this action to serve as notice of rescission of the Agreement, and hereby offer to restore all consideration furnished by the DC Parties under the Agreement, on condition that the DC Parties restore to them the consideration furnished by the Blehm Parties, including all the shares of DC corporate stock formerly held by FDC.

88. In the alternative, if it is no longer possible for the DC Parties to return the shares of DC corporate stock purchased from FDC, then the Blehm Parties request equitable relief permitting them to share in the consideration received by the DC Parties from Quiksilver, in the ratio the Blehm Parties would have received had they not been fraudulently induced into executing the Agreement.

89. As a result of entering into the Agreement, the Blehm Parties have also suffered consequential damages in an amount according to proof.

90. The Blehm Parties are informed and believe and based upon their information and belief allege, that the conduct of the DC Parties, Wright, and DOES 1 through 25, inclusive, was an intentional misrepresentation, deceit, or concealment of a material fact known to the DC Parties, Wright, and DOES 1 through 25, inclusive, done with the intention on their part to deprive the Blehm Parties of property and legal rights causing injury, and was despicable conduct that subjected the Blehm Parties to cruel and unjust hardship in conscious disregard of the Blehm Parties' rights, so as to justify an award of exemplary and punitive damages.

TENTH CAUSE OF ACTION
(Unjust Enrichment against the DC Parties)

91 The Blehm Parties re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 90 of this complaint as though fully set forth here.

92. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties gained a substantial benefit when they obtained FDC's

agreement to sell all its shares of DC corporate stock to DC, since the DC Parties convinced the Blehm Parties to part with shares of DC corporate stock for an amount much less than the amount the DC Parties, in turn, planned to sell their shares of DC corporate stock to other persons or entities.

93. The Blehm Parties are informed and believe, and based upon their information and belief allege, that the DC Parties profited from the sale of DC corporate stock to Quiksilver in increased proportion, because the DC Parties excluded and defrauded the Blehm Parties.

94. The DC Parties also profited from their separate settlement with the Internal Revenue Service to the exclusion of the Blehm Parties, whereby the Internal Revenue Service would continue to seek payment of taxes, interest, and penalties relating to Blehm's prior employment with DC from the Blehm Parties. Under the Agreement, the DC Parties originally agreed to pay approximately $1,800,000, plus all applicable interest and penalties, in connection with the taxes, interest, and penalties relating to Blehm's prior employment with DC, with that amount to be credited to the benefit of the Blehm Parties. Instead, the DC Parties entered into a separate settlement with the Internal Revenue Service whereby the DC Parties paid only a fraction of the taxes, interest, and penalties relating to Blehm's prior employment with DC, and whereby no portion of the payment made was credited to the benefit of the Blehm Parties, leaving the Blehm Parties to be pursued by the Internal Revenue Service for the remaining taxes, interest, and penalties relating to Blehm's prior employment with DC.

95. The Blehm Parties are informed and believe, and based upon their information and belief allege, that it is unjust to allow the DC Parties to retain the ill-gotten benefits they received under the Agreement at the expense of the Blehm Parties.

WHEREFORE, the Blehm Parties pray judgment against the defendants, and each of them, as follows:

ON THE FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF

1. For damages representing the difference between the consideration received by the Blehm Parties from the DC Parties for the purchase of DC corporate stock, and the consideration paid to the DC Parties by Quiksilver for the purchase of DC corporate stock. The

exact amount of the Blehm Parties' loss has not yet been ascertained, but is believed to be in the tens of millions of dollars;

ON THE FIRST, SECOND, SEVENTH AND NINTH CLAIMS FOR RELIEF

2. For exemplary and punitive damages;

ON THE FOURTH CLAIM FOR RELIEF

3. For mandatory injunctive relief requiring the DC Parties to transfer to the Blehm Parties those shares of Quiksilver stock held by the DC Parties that would have been received by the Blehm Parties but for the fraud and deceit of the DC Parties, Wright, and DOES 1 through 25, inclusive;

ON THE FIFTH CLAIM FOR RELIEF

4. For an order specifically enforcing the Agreement and requiring the DC Parties to pay the IRS Claim, plus all interest and penalties that continue to accrue;

ON THE SIXTH, SEVENTH, AND EIGHTH CLAIMS FOR RELIEF

5. For compensatory damages in the amount of approximately $2,200,000, plus applicable penalties and interest;

ON THE FIFTH AND SIXTH CLAIMS FOR RELIEF

6. For reasonable attorneys' fees;

ON THE NINTH CLAIM FOR RELIEF

7. For rescission of the Agreement;

8. In the alternative, equitable relief permitting the Blehm Parties to share in the consideration received by the DC Parties from Quiksilver, in the ratio the Blehm Parties would have received had they not been fraudulently induced into executing the Agreement;

ON THE TENTH CLAIM FOR RELIEF

9. The return of all unjust benefits received by the DC Parties in connection with the Agreement;

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ON ALL CAUSES OF ACTION

10. For statutory prejudgment interest; and

11. For such other and further relief as the court deems just and proper.

DATED: 8-17-06 McCOLLOCH & CAMPITIELLO, LLP

By: [signature]

Lawrence G. Campitiello, Esq.
Attorneys for plaintiffs
CLAYTON D. BLEHM, CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC

EXHIBIT "A"

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release, dated August 20, 2003 (this "Agreement"), is entered into by and among DC Shoes, Inc., a California corporation ("DC Shoes"), Kenneth Block, an individual ("Block"), Damon Way, an individual ("Way"), the Damon Way Revocable Trust u/a May 20, 1999 (the "Way Trust"), DC Shoes Employee Share Trust (the "DC Trust" and together with DC Shoes, Block, Way and the Way Trust, the "DC Parties"), FDC Investments, Inc., a California corporation ("FDC"), Clayton D. Blehm, an individual ("Blehm"), and Clayton Blehm Living Trust 1997 (the "Blehm Trust" and together with FDC and Blehm, the "FDC Parties")(collectively sometimes referred to herein as the "Parties").

RECITALS

A. The FDC Parties are the plaintiffs and the DC Parties, together with Billabong International Limited, a corporation ("Billabong"), are the defendants in a proceeding (Case No. GIN024468) (together with the related cross-action, the "Employment Litigation") before the Superior Court of the State of California, County of San Diego, North County Branch (the "Court"). The Parties desire to dismiss the Employment Litigation, without prejudice, in accordance with the terms and conditions contained herein. In the event that Billabong executes that certain Settlement Agreement and Release, of even date herewith (the "Billabong Settlement Agreement"), by and among the FDC Parties and Billabong, on or before August 27, 2003, Billabong will also be dismissed as a party to the Employment Litigation.

B. FDC is the plaintiff and the DC Parties are the defendants in a proceeding (Case No. GIN028361) before the Court, and the Parties desire to dismiss the Dissolution Litigation, without prejudice, in accordance with the terms and conditions contained herein.

C. In the Employment Litigation, Blehm sought to recover, among other things, damages for the alleged wrongful termination of his employment with DC Shoes by the actions of Block, Way and Billabong in violation of public policy (age discrimination). In their related cross-action, the DC Parties sought, among other things, to rescind the issuance of DC Shoes' stock to FDC because FDC allegedly obtained the stock through fraud. In the Dissolution Litigation, Blehm sought to dissolve DC based on the alleged mismanagement of DC by Block and Way since Blehm's termination.

D. The Parties, although denying any wrongdoing on their parts, recognize the costs and risks inherent in litigation, and have determined the better course is to settle their disputes on the terms contained. DC Shoes has therefore agreed to pay Blehm $10,500,000 in exchange for the FDC Parties' agreement to dismiss the Employment Litigation against them and Billabong and the Dissolution Litigation, and FDC has agreed to sell its minority interest in the stock of DC Shoes to DC Shoes for $4,500,000 (the "Purchase Price") in exchange for the DC Parties' agreement to dismiss their cross-action in the Employment Litigation.

E. The Parties acknowledge that the Purchase Price takes into account the potential adverse effects of the cloud on title created by the cross-action, the Dissolution Litigation, the minority character of FDC's interest represented by the Shares, and the fact there is no ready market for the Shares.

F. The Parties mutually desire to settle fully and finally all obligations and claims between them in accordance with and pursuant to the terms and conditions of this Agreement and to end their relationship as amicably as possible and eliminate the possibility of any future disputes.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree hereby as follows:

1. Filing of Stipulations. On August 28, 2003, if this Agreement has not been revoked as provided for in Section 8 of this Agreement, and following the execution and delivery of this Agreement and the Billabong Settlement Agreement (if Billabong executes the Billabong Settlement Agreement on or before August 27, 2003), the Parties shall file with the Court a Stipulation Re Conditional Dismissal Pending Settlement, in substantially the form attached hereto as Exhibit A, petitioning the Court to dismiss, without prejudice, the Employment Litigation (the "Employment Stipulation"). If Billabong does not execute the Billabong Settlement Agreement on or before August 27, 2003, the Stipulation re Conditional Dismissal Pending Settlement shall be amended to delete Billabong. On August 28, 2003, if this Agreement has not been revoked as provided for in Sections 8 of this Agreement, the Parties shall file with the Court a Stipulation Re Conditional Dismissal Pending Settlement, in substantially the form attached hereto as Exhibit B, petitioning the Court to dismiss, without prejudice, the Dissolution Litigation (the "Dissolution Stipulation").

2. Purchase and Sale of DC Shoes Stock. As part of the settlement between the FDC Parties and the DC Parties set forth herein, FDC will sell and DC Shoes will purchase all of the shares of DC Shoes common stock currently held by FDC (the "Shares"). Concurrently with the execution and delivery of this Agreement, DC Shoes and FDC shall enter into a securities purchase agreement, in substantially the form attached hereto as Exhibit C (the "Securities Purchase Agreement"), pursuant to which FDC agrees to sell and DC Shoes agrees to purchase the Shares.

3. Resignation of Blehm. Blehm hereby resigns his position as a director of DC Shoes, effective upon DC Shoes' delivery of the Consideration (as defined below), subject to being reinstated as a director in the event of an uncured default in the Settlement Promissory Note or in the Purchase Promissory Note.

4. Repayment Obligation. Upon the satisfaction or waiver of each of the conditions set forth in Section 9 hereof, DC Shoes shall forgive, in its entirety, Blehm's obligation to repay (i) $500,000, plus all accrued and unpaid interest thereon, (ii) any use of the DC Shoes credit cards to charge alleged personal, alleged non-business items, or alleged unsubstantiated business expenses, plus all accrued and compound interest thereon to DC Shoes (the "Repayment Obligation"), and at all times thereafter, DC Shoes shall deem the Repayment Obligation to be satisfied in full.

5. IRS Claim. Subject to the satisfaction or waiver of each of the conditions set forth in Section 9 hereof, DC Shoes shall acknowledge and agree that (i) the claim made by the Internal Revenue Service for unpaid taxes relating to Blehm's prior employment with DC Shoes, in the approximate amount of $1,800,000, plus all applicable interest and penalties (the "IRS Claim") is

the sole responsibility of DC Shoes, and (ii) none of the FDC Parties shall have any liability or obligation to DC Shoes in connection with the IRS Claim.

6. Mutual Release.

6.1 Subject to the conditions set forth in Section 9 below, each of the FDC Parties, on its own behalf and on behalf of its past, present and future successors, assigns, agents, representatives and attorneys, agrees to completely release and forever discharge each of the DC Parties from any and all claims, rights, demands, actions, obligations, liabilities, and causes of action of any and every kind, nature, and character whatsoever, known or unknown, arising from or relating to the Employment Litigation and the Dissolution Litigation ("FDC Claims"), including, without limitation, (i) claims arising from Blehm's prior employment by DC Shoes and termination thereof ($2,000,000), (ii) claims under applicable state and federal discrimination laws ($7,500,000), (iii) claims relating to the equal compensation agreement between the FDC Parties and the DC Parties ($500,000); and (iv) any other claims that the FDC Parties may have against the DC Parties as of the date of this Agreement ($500,000); in each case, whether based on tort, contract (express or implied), or any federal, state or local law, statute or regulation; excluding all matters related to Boss Corporation, a Korean corporation; provided, however, that this Agreement does not release or discharge the DC Parties from their obligations under this Agreement.

6.2 Without limiting, in any way, the scope of the releases granted herein, each of the FDC Parties certifies that this Agreement constitutes a knowing and voluntary waiver of any and all rights or claims that exist or that either may have or may claim to have under the Age Discrimination in Employment Act (the "ADEA"), as amended by the Older Workers Benefit Protection Act of 1990 (the "OWBPA"), which is set forth at 29 U.S.C. §§621, et seq. (the "Age Claim Release"). Each of the FDC Parties further acknowledges and agrees that the releases granted by it herein extend to any and all claims including, but not limited to, any alleged (a) violation of the National Labor Relations Act, Title VII of the Civil Rights Act, the Americans With Disabilities Act of 1990, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Consolidated Omnibus Budget Reconciliation Act of 1985; (b) discrimination on the basis of national origin, sex, race, religion, age, disability, marital status, breach of any express or implied employment contract or agreement, wrongful discharge, breach of the implied covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, fraud, misrepresentation, defamation, interference with prospective economic advantage, failure to pay wages due or other monies owed; and (c) any other violation of any local, state or federal law, regulation or ordinance and/or public policy, contract, or tort or common law claim having any bearing whatsoever on the terms and conditions and/or cessation of employment with DC Shoes, including, but not limited to, any allegations for costs, fees, or other expenses, including attorneys' fees, incurred in any of these matters, which the FDC Parties ever had, now has, or may have as of the date hereof.

6.3 Subject to the conditions set forth in Section 9 below, each of the DC Parties, on its own behalf and on behalf of its past, present and future successors, assigns, agents, representatives and attorneys, agrees to completely release and forever discharge each of the FDC Parties from any and all claims, rights, demands, actions, obligations, liabilities, and causes of action of any and every kind, nature, and character whatsoever, known or unknown, arising from or relating to the Employment Litigation and the Dissolution Litigation ("DC Claims"), including, without limitation, (i) all claims related to Blehm's prior employment by DC Shoes, including, without limitation, the IRS Claim, (ii) all claims related to Blehm's position as a director and/or officer of DC Shoes, (iii) all claims related to the Repayment Obligation, and (iv) any and all claims related to any alleged misappropriation or misuse of the corporate funds of DC Shoes; (v) claims relating to the equal compensation agreement between the FDC Parties and the DC Parties; (vi) any other claims that the DC Parties may have against the FDC Parties as of the date of this Agreement; excluding all matters related to Boss Corporation, a Korean corporation; provided, however, that this Agreement does not release or discharge the FDC Parties from their obligations under this Agreement.

6.4 Subject to the conditions set forth in Section 9, below, it is understood and agreed that the releases contained in this Section 6 are full and final releases covering all FDC Claims and all DC Claims, except as set forth in the provisos in Sections 6.1 and 6.3, respectively. Therefore, each party hereby waives any and all rights or benefits which it may now have, or in the future may have, under the terms of Section 1542 of the California Civil Code, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Each party expressly waives and relinquishes any rights it may have under Civil Code 1542 or any other federal, state or local statute or common law principle with a similar effect.

6.5 The parties acknowledge that they or their attorney or agent may hereafter discover claims or facts in addition to or different from those which they now know or believe to exist with respect to the FDC Claims or the DC Claims, but that it is their intention hereby fully, finally, and forever to settle and release all of the FDC Claims and the DC Claims, except as set forth in the provisos in Sections 6.1 and 6.3, respectively. In furtherance of their intention, the releases herein given shall be and remain in effect as full and complete releases notwithstanding the discovery or existence of any such additional or different claim or fact.

6.6 Each party represents and warrants to the other that such party has not heretofore assigned, transferred or granted, or purported to assign, transfer or grant, any of the claims, demands and causes of action disposed of by this Section 6. Each party agrees that such party shall not (i) institute a lawsuit, arbitration or other legal proceeding based upon, arising out of, or relating to any of the claims, demands and causes of action disposed of by this Section 6, (ii) participate, assist, or cooperate in any such proceeding, unless and to the extent required or compelled by law, or (iii) encourage, assist and/or solicit any third party to institute any such proceeding.

7. Consideration for Releases.

7.1 Cash Consideration. In consideration of the releases granted herein by the FDC Parties, DC Shoes shall pay to Blehm an amount equal to Ten Million Five Hundred Thousand Dollars ($10,500,000) (the "Consideration"). The Consideration shall be paid to Blehm concurrently with the execution and delivery of this Agreement by delivery to Blehm of a promissory note, in substantially the form attached hereto as Exhibit D (the "Settlement Promissory Note"), in the principal amount of $9,500,000 and a check for $1,000,000.

7.2 Security. Concurrently with the execution and delivery of this Agreement, DC Shoes, Blehm and FDC shall enter into an escrow agreement, in substantially the form attached hereto as Exhibit F (the "Escrow Agreement"), pursuant to which Higgs, Fletcher & Mack LLP will hold the shares in escrow until the obligations of DC Shoes under each of the Settlement Promissory Note and the Purchase Promissory Note (as defined in the Securities Purchase Agreement) are satisfied in full or there is an Event of Default as defined in either or both the Settlement Promissory Note and the Purchase Promissory Note.

8. Revocability of this Agreement. Applicable law requires that Blehm be advised, and DC Shoes hereby advises Blehm, to consult with an attorney and discuss the Age Claim Release. Blehm hereby acknowledges that he has consulted with an attorney and that DC Shoes has provided to Blehm at least 21 days within which to review and consider the Age Claim Release before executing this Agreement. Blehm understands that he may revoke this Agreement for up to seven calendar days following the execution and delivery of this Agreement (the "Revocation Period") and that this Agreement shall not become effective or enforceable until the Revocation Period has expired. Blehm agrees that such revocation must be in writing and received by Brian Wright of DC Shoes at the address set forth in Section 9.1 of the Securities Purchase Agreement not later than midnight on the seventh day following the execution and delivery of this Agreement by Blehm. If Blehm revokes this Agreement as provided in this Section 7, this Agreement shall no longer be effective or enforceable. Richard L. Kintz of Sheppard Mullin shall hold the $1,000,000 check described in Section 7.1 until the eighth day after the Closing and if he has not received written notice from Brian Wright of the rescission of this Agreement by 3:00 p.m. Pacific Standard Time on August 28, 2003, he shall be authorized to forward the $1,000,000 check to Clayton Blehm.

9. Effectiveness of Releases. The effectiveness and enforceability of the releases granted herein by the FDC Parties and the DC Parties are subject to the satisfaction of each of the following conditions:

(a) Each of the Employment Stipulation and Dissolution Stipulation shall have been filed with the Court, and the Court shall have ordered the dismissal, without prejudice, of each of the Employment Litigation and the Dissolution Litigation;

(b) Blehm shall have resigned as a director of DC Shoes;

(c) Blehm shall not have exercised his right to revoke the Age Claim Release as provided in Section 8 above, and the Revocation Period shall have expired;

(d) all amounts due and payable to Blehm under the Settlement Promissory Note shall have been paid in full in accordance with the terms and conditions contained therein;

(e) DC Shoes and FDC shall have entered into the Securities Purchase Agreement and the closing of the transactions contemplated thereby shall have occurred; and

(f) all amounts due and payable to FDC under the Purchase Promissory Note to be issued by DC Shoes in connection with the Securities Purchase Agreement, in the principal amount of $4,500,000, shall have been paid in full in accordance with the terms and conditions contained in such promissory note.

If the Releases do not become effective due to a failure of one or more of the conditions set forth above in this Section 9, then this Agreement shall be of no further force and effect and the litigation described in Paragraph 1 hereof may be reinstated by the respective parties. None of the money paid pursuant to the Securities Purchase Agreement or this Agreement or the Purchase Promissory Note or the Settlement Promissory Note will need to be returned to DC Shoes, Inc., but instead may be retained by Blehm and FDC, respectively.

10. No Admission. Nothing contained in this Agreement shall be construed as an admission by any party of any liability of any kind to any other party. Each party acknowledges that each other party expressly denies any liability or obligation to any other party.

11. Confidentiality. Each of the FDC Parties, DC Parties and Billabong, on its own behalf and on behalf of its directors, officers, employees, agents, representatives and affiliates (collectively, "Representatives"), hereby agrees that the terms and conditions of this Agreement are to remain confidential, and shall not be disclosed, discussed or revealed to any other person or entity except under a similar obligation of confidentiality or as required by law. In the event any of the FDC Parties or DC Parties or any of their Representatives is questioned about the Employment Litigation or the Dissolution Litigation, such parties shall indicate only that, "the matter has been resolved," and refuse to discuss such matters any further. Notwithstanding the foregoing provisions of this Section 11, DC Shoes may issue a press release following the execution and delivery of this Agreement in the form attached hereto as Exhibit G. In addition, notwithstanding the foregoing provisions of this Section 11 or any other provision of this Agreement or any other agreement to which the parties to this Agreement are parties or by which they are bound (collectively "Agreements"), with respect to any or all of the transactions contemplated by the Agreements (individually and collectively the "Transactions"), (i) any obligations of confidentiality contained in this Section 11 or any other provision of the Agreements, as they relate to any Transactions, shall not apply to the tax structure or tax treatment of the Transactions, and each party to the Agreements (and any employee, representative or agent of any party to the Agreements) may disclose to any and all persons, without limitation of any kind, the tax structure and tax treatment of the Transactions and all materials of any kind (including opinions or other tax analyses) that are provided to such party relating to such tax treatment and tax structure, and (ii) the Agreements shall not limit in any way at any time the ability of any party to the Agreements (or any employee, representative or agent of any party to the Agreements) to consult any tax advisor (including a tax advisor independent from all other entities involved in the Transactions) regarding the tax treatment or tax structure of the Transactions. The immediately preceding sentence is intended to cause the Transactions to be treated as not having been offered under conditions of confidentiality for purposes of Section 1.6011-4(b)(3) of the Treasury Regulations promulgated under Section 6011 of the Internal Revenue Code of 1986, as amended, or any successor provision, and any similar provisions of state, local or foreign law now or hereafter in effect (individually and collectively the "Permitted Disclosure Rule"), and shall be construed in a manner consistent with the purposes of the Permitted Disclosure Rule; provided that, (i) consistent with the Permitted Disclosure Rule, no party to the Agreements (nor any employee, representative or agent thereof) may disclose any information to the extent such disclosure could result in a violation of any federal or state securities law; and (ii)

the immediately preceding sentence shall not apply to the extent disclosure to a person other than the United States Internal Revenue Service or a corresponding state tax authority would result in a violation of other applicable law (including without limitation privacy rights of employees and other persons). In addition, each party to the Agreements acknowledges that it has no proprietary or exclusive rights to the federal tax structure of the Transactions or any federal tax matter or federal tax idea related to the Transactions.

12. Satisfaction of Conditions. Upon performance of the Parties' obligations hereunder including, but not limited to payment of the Consideration (Paragraph 7.1), Purchase and Sale of the DC Shoes Stock (Paragraph 2), Resignation of Blehm (Paragraph 3), forgiveness of debt (Paragraph 4) and execution of the Releases, the Parties shall cooperate in the filing of dismissals of the Employment Litigation and Dissolution Litigation, with prejudice.

13. Remedies in the Event of Default Under the Settlement Promissory Note.

13.1 Remedies. The remedies of the holder of the Settlement Promissory Note in the Event of a Default thereunder are as follows:

(a) Retain all payments that have been made under the Settlement Promissory Note;

(b) Reacquire the Shares from the Escrow Agent;

(c) Reinstitute the litigation described in Section 1 of the Settlement Agreement; and

(d) Reinstated as a member of the DC Board of Directors at his option.

The remedies hereunder are cumulative.

13.2 No Right to Sue under the Settlement Promissory Note. The Seller does not have the right to sue the Company under the Settlement Promissory Note in the Event of Default for other than interest or late payment charges that accrued up to the time of the Event of Default.

14. Right of DC Parties and FDC Parties with Respect to the Shares.

14.1 Right to Vote. The Seller hereby grants to Ken Block and Damon Way the right to represent the Shares at any annual or special meeting of the shareholders and to vote such Shares or give its written consent to the voting of such Shares, unless and until such time as Ken Block and Damon Way receive written notice from the Seller of the occurrence of an Event of Default as such term is defined in the Settlement Promissory Note and /or in the Purchase Promissory Note. Upon the receipt of notice of an event of default, the voting rights shall be returned to the Seller who hereby appoints Blehm to vote such Shares. Seller shall deliver two proxies, one to Ken Block to vote 1,500,000 Shares and one proxy to Damon Way to vote 1,500,000 Shares of the Settlement Agreement has not been rescinded by midnight August 28, 2003.

14.2 Resignation from the Board of Directors. Upon the Closing Date, the Seller shall cause Blehm to resign from his position as a member of the board of directors of Purchaser unless and until the occurrence of an Event of Default, at which time he shall again become a member of the board of directors at his option. This resignation shall be delivered to Seller on August 28, 2003 if the Settlement Agreement has not been rescinded.

14.3 Shareholders Agreement Dated January 1, 1999. Block, Way and the Way Trust consent to the transactions authorized in the Securities Purchase Agreement and the Settlement Agreement. Seller agrees that the Shareholders Agreement dated January 1, 1999 shall no longer be effective and shall terminate when the conditions set forth in Section 9 of the Settlement Agreement are all satisfied.

15. Miscellaneous.

15.1 Governing Law. This Agreement shall be governed by and construed in accordance with the internal laws of the State of California (irrespective of its choice of law principles).

15.2 Entire Agreement. This Agreement and the Operative Agreements (as defined in the Securities Purchase Agreement) constitute the entire agreement between the parties hereto and supersede all prior agreements between such parties. Each of the parties hereto acknowledges that no representations, inducements, promises, agreements, or warranties, oral or otherwise, have been made by it, or anyone acting on its behalf, which are not embodied in this Agreement or the Operative Agreements, and that it has not executed this Agreement in reliance upon any such representation, inducement, promise, agreement, or warranty not contained in this Agreement or the Operative Agreements.

15.3 Severability. If any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void, or unenforceable, the remainder of this Agreement and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto.

15.4 Successors. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective heirs, legal representatives, successors, and permitted assigns.

15.5 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other parties, it being understood that all parties need not sign the same counterpart.

15.6 Attorneys' Fees. Should suit be brought to enforce or interpret any part of this Agreement, the prevailing party will be entitled to recover, as an element of the costs of suit and not as damages, reasonable attorneys' fees to be fixed by the court (including, without limitation, costs, expenses and fees on any appeal).

15.7 Consultation with Counsel. Each of the parties to this Agreement acknowledges and agrees that it fully understands its right to discuss all aspects of this Agreement with a private attorney, and that to the extent, if any, it has desired, it has availed itself of this right, that it has carefully read and fully understands all of the provisions of this Agreement, and that it is voluntarily entering into this Agreement.

15.8 Further Assurances. Each of the parties to this Agreement shall execute such documents and other papers and take such further actions as may be reasonably required or desirable to carry out the provisions hereof and the transactions contemplated hereby.

15.9 No Strict Construction. The language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rules of strict construction will be applied against either party.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date first above written.

FDC PARTIES:

FDC INVESTMENTS, INC., a California corporation

By: ______________________
Printed Name:
Title:
Dated:

____
Clayton D. Blehm, an individual (date)

CLAYTON BLEHM LIVING TRUST 1997

By: ______________________
Printed Name:
Title:
Dated:

DC PARTIES:

DC SHOES, INC., a California corporation

By: ______________________
Printed Name: Brian Sellstrom
Title: CEO
Dated: 8/20/03

____
Kenneth Block, an individual (date)

____
Damon Way, an individual (date)

DAMON WAY REVOCABLE TRUST U/A MAY 20, 1999

By: ______________________
Printed Name:
Title:
Dated:

DC SHOES EMPLOYEE SHARE TRUST

By: ______________________
Printed Name:
Title:
Dated:

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date first above written.

FDC PARTIES:

FDC INVESTMENTS, INC., a California corporation

By: [signature]
Printed Name: Clayton D. Blehm
Title: President
Dated: August 20, 2003

DC PARTIES:

DC SHOES, INC., a California corporation

By: ____________________
Printed Name:
Title:
Dated:

[signature] 8/20/03
Clayton D. Blehm, an individual (date)

____
Kenneth Block, an individual (date)

CLAYTON BLEHM LIVING TRUST 1997

By: [signature]
Printed Name: Clayton D. Blehm
Title: Trustee
Dated: August 20, 2003

____
Damon Way, an individual (date)

DAMON WAY REVOCABLE TRUST U/A MAY 20, 1999

By: ____________________
Printed Name:
Title:
Dated:

DC SHOES EMPLOYEE SHARE TRUST

By: ____________________
Printed Name:
Title:
Dated:

EXHIBIT A

Employment Stipulation

EXHIBIT B

Dissolution Stipulation

EXHIBIT C

Securities Purchase Agreement

EXHIBIT D

Settlement Promissory Note

EXHIBIT F

Escrow Agreement

EXHIBIT G

Press Release

Exhibit 9

F I L E D
Clerk of the Superior Court
JAN 0 4 2008

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation, Plaintiffs, v. DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT, an individual; and DOES 1 through 25, inclusive, Defendants.	Case No. GIN 054897 ~~[PROPOSED]~~ JUDGMENT AFTER JURY TRIAL Judge: David G. Brown Dept.: 25

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NORTH COUNTY DIVISION SAN DIEGO SUPERIOR COURT

NB1:733714.2

This action came on regularly for trial on October 18, 2007, in Department 25 of the above-referenced Court, the Honorable David G. Brown, presiding. On October 29, 2007, the Court impaneled and swore a jury of 12 persons, and two alternate jurors, who over the course of the next six weeks, heard the testimony of approximately 13 duly sworn witnesses. Plaintiffs were represented at trial by Lawrence G. Campitiello of McColloch & Campitiello, LLP; defendants were represented at trial by Michael G. Yoder and Molly J. Magnuson of O'Melveny & Myers LLP.

At the close of plaintiffs' case, the Court granted in part defendants' motion for nonsuit pursuant to California Code of Civil Procedure Section 581c(a), ordering as follows: (1) that judgment be entered in favor of defendant Brian Wright on plaintiffs' second cause of action for intentional concealment; (2) that judgment be entered in favor of defendants Kenneth Block, Damon Way and the Damon Way Revocable Trust U/A dated May 20, 1999 (the "Way Trust") on plaintiffs' sixth cause of action for breach of contract; and (3) that, as a matter of law, plaintiffs were not entitled to punitive damages from Block, Way or the Way Trust.

At the conclusion of all evidence, the Court granted in part defendants' motion for a directed verdict pursuant to California Code of Civil Procedure Section 630(a), ordering as follows: (1) that judgment be entered in favor of Block, Way and the Way Trust on plaintiffs' second cause of action for intentional concealment; and (2) that, as a matter of law, plaintiffs were not entitled to punitive damages from defendant DC Shoes, Inc. ("DC Shoes").

After the conclusion of all evidence and arguments of counsel, the Court duly instructed the jury on the remaining causes of action against DC Shoes and directed the jury to return a special verdict as to such causes of action; whereupon the jury retired, deliberated and on December 4, 2007 announced its verdict in favor of defendant DC Shoes and against plaintiffs Clayton D. Blehm, the Clayton Blehm Living Trust 1997 and FDC Investments, Inc. on all causes of action submitted to it as follows:

"SPECIAL VERDICT FORM

We answer the questions submitted to us as follows:

I. BREACH OF CONTRACT

1. Was there a written Settlement Agreement and Release between DC Shoes, Inc. ("DC Shoes"), on one side, and Clayton D. Blehm, on the other side?

_X_ Yes ___ No

If your answer to question 1 is "yes," then answer question 2. If your answer to question 1 is "no," stop here, answer no further questions in Section I, and go to Section II.

2. Did Mr. Blehm do all, or substantially all, of the significant things that the Settlement Agreement and Release required him to do?

_X_ Yes ___ No

If your answer to question 2 is "yes," then answer question 3. If your answer to question 2 is "no," stop here, answer no further questions in Section I, and go to Section II.

3. Did DC Shoes fail to do something that it was required to do under the terms of the Settlement Agreement and Release?

___ Yes _X_ No

If your answer to question 3 is "yes," then answer question 4. If your answer to question 3 is "no," stop here, answer no further questions in Section I, and go to Section II.

4. Was Mr. Blehm harmed by DC Shoes' failure?

___ Yes ___ No

If your answer to question 4 is "yes," then answer question 5. If your answer to question 4 is "no," stop here, answer no further questions in Section I, and go to Section II.

5. What is the amount of Mr. Blehm's damages, if any?

$________________

Proceed to Section II.

II. INTENTIONAL CONCEALMENT

1. Did DC Shoes intentionally fail to disclose an important fact that FDC Investments, Inc. ("FDC Investments") and Clayton D. Blehm ("Plaintiffs") could not

have discovered in connection with DC Shoes' purchase of FDC Investments' stock in DC Shoes?

___Yes _X_ No

If you answered "yes" to question 1, then answer question 2. If you answered "no" to question 1, stop here, answer no further questions in this Section II, and have the presiding juror sign and date this form.

2. Was the fact DC Shoes failed to disclose known only to DC Shoes?

___Yes ___No

If you answered "yes" to question 2, then answer question 3. If you answered "no" to question 2, stop here, answer no further questions in this Section II, and have the presiding juror sign and date this form.

3. Did DC Shoes intend to deceive Plaintiffs by concealing the fact?

___Yes ___No

If you answered "yes" question 3, then answer question 4. If you answered "no" to question 3, stop here, answer no further questions in this Section II, and have the presiding juror sign and date this form.

4. Did Plaintiffs reasonably rely on the concealment?

___Yes ___No

If you answered "yes" to question 4, then answer question 5. If you answered "no" to question 4, stop here, answer no further questions in Section II, and have the presiding juror sign and date this form.

5. Were Plaintiffs harmed by the concealment?

___Yes ___No

If you answered "yes" to question 5, then answer question 6. If you answered "no" to question 5, stop here, answer no further questions in Section II, and have the presiding juror sign and date this form.

6. Was the concealment by DC Shoes a substantial factor in causing harm to Plaintiffs?

___Yes ___No

If you answered "yes" to question 6, then answer question 7. If you answered "no" to question 6, stop here, answer no further questions in Section II, and have the presiding juror sign and date this form.

7. What are Plaintiffs' damages, if any?

$______________________

If you answered question 7 with a damages amount greater than zero, then answer question 8. If you answered "zero" or "no damages" to question 7, stop here, answer no further questions in Section II, and have the presiding juror sign and date this form.

8. Did DC Shoes prove by clear and convincing evidence that Plaintiffs freely and knowingly accepted the benefits of the sale of FDC Investments' stock in DC Shoes despite their knowledge of facts forming the basis of their intentional concealment claim?

___Yes ___No"

The jury's findings on the questions answered were unanimous, except for its answer "no" in response to Question I-3, for which the vote was 11 to 1, and its answer "no" in response to Question II-1, for which the vote was 10 to 2.

After the jury's verdict was read, the Court issued its ruling in favor of all defendants and against plaintiffs on plaintiffs' first cause of action for breach of fiduciary duty, ordering that judgment be entered in favor of defendants on that claim.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

1. Plaintiffs CLAYTON D. BLEHM, THE CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC., and each of them, take nothing by way of their Complaint against defendants DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 and BRIAN WRIGHT; and

2. Defendants DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE

DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 and BRIAN WRIGHT shall have and recover from plaintiffs CLAYTON D. BLEHM, THE CLAYTON BLEHM LIVING TRUST 1997 and FDC INVETMENTS, INC., and each of them, their costs of suit in the sum of $ pursuant to cost memo

DATE: Jan 4, 2008 ~~2007~~

Hon. David G. Brown,
Judge of the Superior Court

F I L E D
Clerk of the Superior Court
JAN 04 2008

PROOF OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 610 Newport Center Drive, 17th Floor, Newport Beach, California 92660-6429. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence collected from me would be processed on the same day, with postage thereon fully prepaid and placed for deposit that day with the United States Postal Service. On December 14, 2007 I served the following:

[~~PROPOSED~~] JUDGMENT AFTER JURY TRIAL

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

Lawrence G. Campitiello, Esq.
McColloch & Campitiello, LLP
5900 La Place Court, Suite 100
Carlsbad, CA 92008-8832

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 14, 2007, at Newport Beach, California.

Linda Evington

Exhibit 10

TO BE FILED IN THE COURT OF APPEAL

APP-004

CIVIL CASE INFORMATION STATEMENT

COURT OF APPEAL, California APPELLATE DISTRICT, DIVISION 4

Court of Appeal Case Number (if known): D053399

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Law Office of Roy R. Withers, Esq.
Roy R. Withers, Esq. (State Bar No. 120779)
2802 Juan Street; Suite 12
San Diego, CA 92110
TELEPHONE NO.: 619-295-1305 FAX NO. (Optional): 619-297-9036
E-MAIL ADDRESS (Optional):
ATTORNEY FOR (Name): Clayton Blehm, et al.

FOR COURT USE ONLY

APPELLANT: Clayton Blehm, et al.

RESPONDENT: DC Shoes, Inc., et al.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 325 South Melrose Drive
MAILING ADDRESS:
CITY AND ZIP CODE: Vista, CA 92083
BRANCH NAME: North County Division

JUDGES (all who participated in case):
David G. Brown

Superior Court Case Number: GIN 054897

NOTE TO APPELLANT: You must file this form with the clerk of the Court of Appeal within 10 days after the clerk mails you a notice that this form must be filed. You must attach to this form (1) a copy of the judgment or order being appealed that shows the date it was entered (see Cal. Rules of Court, rule 8.104 for definition of "entered") and (2) proof of service of this form on all parties to the appeal. (CAUTION: An appeal in a limited civil case (Code Civ. Proc., § 85) may be taken ONLY to the appellate division of the superior court (Code Civ. Proc., § 904.2), or to the superior court (Code. Civ. Proc., § 116.710 [small claims cases]).

PART I – APPEAL INFORMATION

A. APPEALABILITY

1. Appeal is from:
   - [✓] Judgment after jury trial
   - [ ] Judgment after court trial
   - [ ] Default judgment
   - [ ] Judgment after an order granting a summary judgment motion
   - [ ] Judgment of dismissal under Code Civ. Proc., §§ 581d, 583.250, 583.360, or 583.430
   - [ ] Judgment of dismissal after an order sustaining a demurrer
   - [ ] An order after judgment under Code Civ. Proc., § 904.1(a)(2)
   - [ ] An order or judgment under Code Civ. Proc., § 904.1(a)(3)–(13)
   - [ ] Other *(describe and specify code section that authorizes this appeal):*

2. Does the judgment appealed from dispose of all causes of action, including all cross-actions between the parties?
   [✓] Yes [ ] No If no, please explain why the judgment is appealable:

B. TIMELINESS OF APPEAL *(Provide all applicable dates.)*

1. Date of entry of judgment or order appealed from: 01 / 04 / 08
2. Date that notice of entry of judgment or a copy of the judgment was mailed by the clerk or served by a party under California Rules of Court, rule 8.104: 01 / 04 / 08
3. Was a motion for new trial, judgment notwithstanding the verdict, reconsideration, or to vacate the judgment made and denied?
   [ ] Yes [✓] No If yes, please specify the type of motion:

   Date motion filed: ___/___/___ Date denied: ___/___/___ Date denial served: ___/___/___
4. Date notice of [✓] appeal or [ ] cross-appeal filed: 07 / 02 / 08

C. BANKRUPTCY OR OTHER STAY

Is there a related bankruptcy case or a court-ordered stay that affects this appeal? [ ] Yes [✓] No *(If yes, please attach a copy of the bankruptcy petition [without attachments] and any stay order.)*

American LegalNet, Inc.
www.FormsWorkflow.com

APP-004

APPELLATE CASE TITLE: BLEHM vs. DC SHOES, et. al	SUPERIOR COURT CASE NUMBER: GIN 054897

D. APPELLATE CASE HISTORY *(Provide additional information, if necessary, on attachment I.D.)*
Is there now, or has there previously been, any appeal, writ, or other proceeding related to this case pending in any California appellate court? ☐ Yes ☑ No If yes, insert name of appellate court:
Appellate court case no.: Title of case:
Name of trial court: Trial court case no.:

E. SERVICE REQUIREMENTS
Is service of documents in this matter, including a brief or a petition, required on the Attorney General or other nonparty public officer or agency under California Rules of Court, rule 8.29 or a statute? Yes ☐ No ☑ *If yes, please indicate the rule or statute that applies.*

☐ Rule 8.29
☐ Bus. & Prof. Code, § 17209 (Unfair Competition Act)
☐ Bus. & Prof. Code, § 17536.5 (False advertising)
☐ Civ. Code, § 51.1 (Unruh, Ralph, or Bane Civil Rights Acts; antiboycott cause of action; sexual harassment in business or professional relations; civil rights action by district attorney)
☐ Civ. Code, § 55.2 (Disabled access to public conveyances, accommodations, and housing)
☐ Gov. Code, § 4461 (Disabled access to public buildings)
☐ Gov. Code, § 12656(a) (False Claims Act)
☐ Health & Saf. Code, § 19954.5 (Accessible seating and accommodations)
☐ Health & Saf. Code, § 19959.5 (Disabled access to privately funded public accommodations)
☐ Other *(please specify statute)*:

NOTE: The rule and statutory provisions listed above require service of a copy of a party's brief or petition and brief on the Attorney General or other public officer or agency. Other statutes requiring service on the Attorney General or other public officers or agencies may also apply. (See, e.g., Code Civ. Proc., § 1355; Gov. Code, § 946.6(d); Pub. Resources Code, § 21167.7.)

PART II – NATURE OF ACTION

A. Nature of action *(check all that apply)*:

1. ☐ Conservatorship
2. ☑ Contract
3. ☐ Eminent domain
4. ☐ Equitable action a. ☐ Declaratory relief b. ☐ Other *(describe)*:
5. ☐ Family law
6. ☐ Guardianship
7. ☐ Probate
8. ☐ Real property rights a. ☐ Title of real property b. ☐ Other *(describe)*:
9. ☑ Tort
   a. ☐ Medical malpractice b. ☐ Product liability
   c. ☐ Other personal injury d. ☐ Personal property
   e. ☑ Other tort *(describe)*: Fraud
10. ☐ Trust proceedings
11. ☐ Writ proceedings in superior court
   a. ☐ Mandate (Code Civ. Proc., § 1085) b. ☐ Administrative mandate (Code Civ. Proc., § 1094.5)
   c. ☐ Prohibition (Code Civ. Proc., § 1102) d. ☐ Other *(describe)*:
12. ☑ Other action *(describe)*: Fraud

B. ☐ This appeal is entitled to calendar preference/priority on appeal *(cite authority)*:

PART III – PARTY AND ATTORNEY INFORMATION

Please attach to this form a list of all the parties and all their attorneys of record who will participate in the appeal. For the parties, include the following information: the party's name and his or her designation in the trial court proceeding (plaintiff, defendant, etc.). For the attorneys, include the following information: name, State Bar number, mailing address, telephone number, fax number, and e-mail address.

Date: 7/14/08

This statement is prepared and submitted by:

▶ [signature]
(SIGNATURE OF ATTORNEY OR UNREPRESENTED PARTY)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation; Plaintiffs, vs. DC SHOES, INC., et. al., Defendants.	Case No. GIN054897 ORDER AFTER HEARING ON PLAINTIFF'S MOTION TO TAX COSTS AND DEFENDANT'S MOTION FOR ATTORNEYS' FEES

I. PROCEDURAL HISTORY

Judgment in this matter issued on January 4, 2008. A jury found for the defendant on the causes of action for breach of contract and intentional concealment. Costs were awarded to the defendants pursuant to a duly filed costs memorandum. *(Judgment filed January 4, 2008.)*

DC Shoes filed its memorandum of costs on January 22, 2008, requesting total costs of $64,339.50. [Memorandum of Costs filed January 22, 2008.] BLEHM filed a timely motion to tax these costs. DC Shoes filed a separate motion for attorneys' fees requesting fees in the amount of $1,172,718. [Motion for Attorneys' Fees filed January 22, 2008.]

BLEHM filed an opposition to the motion for attorneys' fees. DC Shoes filed opposition to the motion to tax costs. Appropriate and timely replies were filed to both oppositions.

This matter began in the United States District Court with BLEHM filing a July 14, 2005 complaint. That action was voluntarily dismissed by BLEHM on April 20, 2006. The state court action was initiated on August 17, 2006.

II. DEFENDANT DC SHOES IS THE PREVAILING PARTY

"'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (CCP § 1032 (a) (4).)

III. MOTION TO TAX COSTS

The award of costs is statutory. CCP § 1033.5(a) identifies those costs which are allowable and § 1033.5(b) identifies those which are not. Subsection (c) (4) allows the court, in its discretion, to allow or deny costs not otherwise mentioned in subsections (a) or (b). All costs must be "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (CCP §1033.5(c) (2).)

Costs recoverable under CCP § 1032 are restricted to those that are both (1) reasonable in amount and (2) reasonably necessary to the conduct of the litigation. (CCP § 1033.5(c) (2) & (3).)

//

Costs "merely convenient or beneficial to its preparation" are disallowed. (CCP § 1033.5(c) (2); *Nelson v. Anderson* (1999) 72 Cal. App. 4th 111, 129; *Ladas v. California State Auto. Association* (1993) 19 Cal. App. 4th 761, 774.)

The court has power to disallow even costs "allowable as a matter of right" if they were not "reasonably necessary," and to reduce the amount of any cost item to that which is "reasonable." (*Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal. App. 4th 238, 245.)

BLEHM moved to tax costs in the following three areas:

A. FILING AND MOTION FEES OF $1,820

BLEHM moved to strike $40.00 for a motion to strike in this matter and $180.00 for a motion to dismiss brought in U.S. District Court.

DC SHOES argues that this cost is allowable despite the fact the motion was denied and that costs incurred in relation to the district court motion should be awarded as the work done in that case was ultimately useful in this matter.

DC SHOES is correct regarding the first argument but incorrect as to the second. Accordingly, they are awarded the $40.00 filing fee for their unsuccessful state court motion. However, their request for costs incurred in the district court is inappropriate and therefore disallowed as they are only award costs based on their status as the prevailing party in *this* matter.

Based on the above, these costs are taxed by $180.00 for an award of $1,640.

//

//

//

B. EXPERT WITNESS FEES OF $20,825

BLEHM seeks to tax these costs by $8,575, arguing that pursuant to the Local Rules of Court, rule 2.1.11, $250 per hour is the customary rate paid an attorney acting as an expert witness. (Local Rules of Court, rule 2.1.11.)

DC SHOES argues that the $425.00 charged by its expert was reasonable based on his level of expertise. By definition, all "experts" are highly qualified and deserving of reasonable fees. This court has established a guideline from which a departure is not warranted. Accordingly, these costs will be taxed by $8,575 for an award of $12,250.

C. TRIAL EXHIBIT COSTS OF $14,845.42

BLEHM moves to tax the cost of the trial presentation equipment and questions whether credit was given for sums paid to DC SHOES for these costs. Because DC SHOES failed to itemize these costs, the court cannot determine what was actually paid for each subcategory claimed.

DC SHOES argues it is entitled to $600.00 in rental equipment because they are allowable under CCP § 1033.5 (a) (12) and because the attorney's fees provision contracted to by the parties references "costs." DC SHOES does not address the issue whether an offset was given for sums BLEHM already paid.

CCP § 1033.5 (a) (12) states "[m]odels and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact." Rental equipment used to display exhibits is a recoverable cost item. (*Ripley v. Pappadopoulos* (1994) 23 Cal. App. 4th 1616, 1623.) Accordingly, these costs will not be taxed.

D. COST AWARD

Based on the above, DC SHOES total costs will be taxed $8,755, for a total cost award of $55,584.53.

//

IV. MOTION FOR ATTORNEYS' FEES

In an action to enforce a contract authorizing an award of attorney's fees, the party "prevailing on the contract" is entitled to reasonable attorney's fees. *(Civic. § 1717.)* Such fee awards are allowable as court costs pursuant to CCP § 1032. *(CCP § 1032.)*

In determining "prevailing party" status, we look to the party who recovered greater relief in the action on the contract. *(Civ.C. § 1717(b) (1).)* When a party obtains a simple, unqualified victory, as did DC SHOES, by completely prevailing on or defeating, all contract claims and the contract provides for attorney fees, Civil Code § 1717 entitles that party to recover reasonable attorney fees as *a matter of law*. *(Civil Code § 1717; Scott Co. of Calif. v. Blount, Inc.* (1999) 20 Cal. 4th 1103, 1109; *Hsu v. Abbara* (1995) 9 Cal. 4th 863, 865.) As discussed in section II above, DC SHOES is the prevailing party.

Additionally, if a cause of action has been voluntarily dismissed, or dismissed pursuant to settlement, there is no prevailing party for purposes of awarding Civil Code § 1717 fees under the contract. (Civ.C. § 1717(b) (2); *Santisas v. Goodin* (1998) 17 Cal. 4th 599, 617; *Pacific Custom Pools, Inc. v. Turner Const. Co.* (2000) 79 Cal. App. 4th 1254, 1267.)

The settlement agreement entered into by the parties on August 20, 2003 contains the following attorney's fees provision:

> 15.6 Attorney's Fees. Should suit be brought to enforce or interpret any part of this Agreement, the prevailing party will be entitled to recover, as an

element of the costs of suit and not as damages, reasonable attorney's fees to be fixed by the court (including, without limitation, costs, expenses and fees on any appeal.)

The Securities Purchase Agreement entered into between the parties also on August 20, 2003, contains the following attorney's fees provision:

> 11.6 Attorney's Fees. If any legal action or other proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the successful or prevailing party shall be entitled to recover reasonable attorneys fees and other costs incurred in that action or proceeding in an addition to any other relief to which it may be entitled.

DC SHOES seek $1,172,718 in attorney's fees. They claim fees under both the settlement agreement and the securities purchase agreement. This court finds that fees are recovered only under the settlement agreement, this being the sole agreement at issue during trial.

DC SHOES state the current action had seven distinct phases: 1) work related to the United States District Court action [$71,215.50]; 2) work related to pleadings in the state court action [$28,510]; 3) work related to discovery in the state court action [$322,464]; 4) work related to mediation in the state court action [$18,999.50]; 5) work related to preparation for trial in the state court action [$332,161.50]; 6) trial in the state court action [$397,562]; and, 7). post-trial work in the state court action [$1,805].

DC SHOES argues the attorneys' fees provision in the settlement agreement is broad enough to allow recovery not only on BLEHMS' breach of contract claim but the claims for fraud and breach of fiduciary duty. They argue the attorneys' fees provision in the stock purchase agreement also allows for such recovery. However, as discussed, this court specifically holds only the settlement agreement provisions to be controlling.

BLEHM concedes that DC SHOES prevailed but makes the following arguments: 1) any fees incurred in prior District Court action are not recoverable; 2) fees incurred in connection with tort causes of action are not recoverable; 3) the hourly rate charged is excessive; and, 4) the hours spent are duplicative and excessive.

DC SHOES made no showing that the fees incurred in defending the District Court action significantly assisted in defending the state court action. The District Court declined to award attorney's fees following BLEHMS' voluntary dismissal of the federal action stating "although defendants have presented evidence that demonstrates some of the work completed in this case may not be used in later state court proceeding, this Court is not persuaded by defendant's explanation of why such a substantial portion of the work completed in defending the instant case is clearly unusable in state court." Simply because the District Court ruled that "not all work" in the federal action was wasted, it does not necessarily follow that all work expended in the District Court action assisted DC SHOES in the current action. This aspect of the attorney's fees request is denied as DC SHOES failed to show the relevance of these legal services to the state court action.

Second, where non-contract claims (e.g., tort claims) are joined in "an action on a contract," the court's power to award fees on the non-contract claims depends on the wording of the attorney fee clause. When a contractual attorney's fees provision is narrowly worded, covering only actions "on the contract" or "to enforce the contract," there can be no recovery for services on other claims and fees must be apportioned to reflect counsel's services at trial on the separate contract versus non-contract claims.

(*Reynolds Metals Co. v. Alperson* (1979) 25 Cal. 3d 124, 129; *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal. App. 4th 698, 708–709.)

Even when a contractual attorneys' fees provision is narrowly worded, fees need not be apportioned if counsel's services relate to an issue common to both the contract and non-contract claims. (*Wilshire Westwood Association v. Atlantic Richfield Co.* (1993) 20 Cal. App. 4th 732, 747; *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal. App. 4th 1073, 1083.) If, however, the award of attorneys' fees is based upon a broadly worded fee provision, recovery for such fees is not limited to contract causes of action, but to tort claims "arising out of," the contract. (*Santisas v. Goodin* (1998) 17 Cal. 4th 599, 608; *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal. App. 4th 1063, 1071–1072; *Moallem v. Coldwell Banker Commercial Group, Inc.* (1994) 25 Cal. App. 4th 1827, 1831; *Thompson v. Miller* (2003) 112 Cal. App. 4th 327, 336.)

Here, whether or not DC SHOES may recover for both tort-based and contract-based causes of action depends on which attorney fee provision applies. As previously stated, this court finds that the attorney fee provision contained in the settlement agreement controls. That provision is narrowly-worded and does not encompass tort-based causes of action. Accordingly, the court finds it inappropriate to award attorney's fees incurred in connection with non-contract causes of action.

Third, the court finds that the hourly rate requested by DC SHOES is excessive. The statement is made without any inference as to the quality of legal services rendered by all counsel involved, which was uniformly excellent at all levels.

Fourth, the court finds BLEHM's argument regarding duplication of effort to be meritorious and therefore reduces the award accordingly.

Based on the above, total attorneys' fees are awarded in the amount of $234,962.

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V. AWARD

For the reasons stated above, DC SHOES is awarded $234,962 in total attorneys' fees, as reasonable, plus an additional $55,584.53 in costs.

//

IT IS SO ORDERED.

Dated: 5/8/08

DAVID G. BROWN
Judge of the Superior Court

APPELLATE CASE TITLE:	SUPERIOR COURT CASE NUMBER:
BLEHM VS. DC SHOES, et al.	GIN 054897

PART III - PARTY AND ATTORNEY INFORMATION:

PLAINTIFFS: CLAYTON D. BLEHM; CLAYTON BLEHM LIVING TRUST; FDC INVESTMENTS INC.

ATTORNEY: ROY R. WITHERS, ESQ. (STATE BAR NO. 120779)
2802 JUAN STREET; SUITE 12
SAN DIEGO, CA 92110
PH: 619-295-1305
Fx: 619-297-9036

DEFENDANTS: DC SHOES, INC.; KENNETH BLOCK; DAMON WAY; THE DAMON WAY REVOCABLE TRUST; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT; DOES 1-25

ATTORNEY: MICHAEL YODER, ESQ. (STATE BAR NO. 83059)
MOLLY MAGNUSON (STATE BAR NO. 229444)
O'MELVENY & MEYERS LLP
610 NEWPORT CENTER DR., 17th FLOOR
NEWPORT BEACH, CA 92660-6429
PH: 949-760-9600
Fx: 949-823-6994

CIVIL CASE INFORMATION STATEMENT - ATTACHMENT

POS-030

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Law Office of Roy R. Withers, Esq. Roy R. Withers, Esq. (State Bar No. 120779) 2802 Juan Street; Suite 12 San Diego, CA 92110 TELEPHONE NO.: 619-295-1305 FAX NO. (Optional): 619-297-9036 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Clayton Blehm, et al.	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: 750 B Street, Suite 300 CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: COURT OF APPEAL Fourth Appelate Dist. - Division 1	
PETITIONER/PLAINTIFF: Clayton Blehm, et al. RESPONDENT/DEFENDANT: DC Shoes, Inc., et al.	
PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL	CASE NUMBER: GIN 054897 / D053399

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. I am over 18 years of age and **not a party to this action.** I am a resident of or employed in the county where the mailing took place.

2. My residence or business address is:
   2802 Juan Street; Suite 12, San Diego, CA 92110

3. On *(date)*: 7/29/08 I mailed from *(city and state)*: San Diego, CA
   the following **documents** *(specify)*:
   CIVIL CASE INFORMATION STATEMENT

   ☐ The documents are listed in the *Attachment to Proof of Service by First-Class Mail—Civil (Documents Served)* (form POS-030(D)).

4. I served the documents by enclosing them in an envelope and *(check one)*:
   a. ☐ **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid.
   b. ☑ **placing** the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

5. The envelope was addressed and mailed as follows:
   a. **Name** of person served: Michael Yoder & Molly Magnuson
   b. **Address** of person served:
      O'MELVENY & MEYERS LLP
      610 Newport Center Dr., 17th Floor
      Newport Beach, CA 92660-6429

   ☐ The name and address of each person to whom I mailed the documents is listed in the *Attachment to Proof of Service by First-Class Mail—Civil (Persons Served)* (POS-030(P)).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

MEGAN WECKESSER
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

INFORMATION SHEET FOR PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL

(This information sheet is not part of the Proof of Service and does not need to be copied, served, or filed.)

NOTE: This form should **not** be used for proof of service of a summons and complaint. For that purpose, use *Proof of Service of Summons* (form POS-010).

Use these instructions to complete the *Proof of Service by First-Class Mail—Civil* (form POS-030).

A person over 18 years of age must serve the documents. There are two main ways to serve documents: (1) by personal delivery and (2) by mail. Certain documents must be personally served. You must determine whether personal service is required for a document. Use the *Proof of Personal Service–Civil* (form POS-020) if the documents were personally served.

The person who served the documents by mail must complete a proof of service form for the documents served. **You cannot serve documents if you are a party to the action.**

INSTRUCTIONS FOR THE PERSON WHO SERVED THE DOCUMENTS

The proof of service should be printed or typed. If you have Internet access, a fillable version of the Proof of Service form is available at *www.courtinfo.ca.gov/forms.*

Complete the top section of the proof of service form as follows:

First box, left side: In this box print the name, address, and telephone number of the person *for* whom you served the documents.

Second box, left side: Print the name of the county in which the legal action is filed and the court's address in this box. The address for the court should be the same as on the documents that you served.

Third box, left side: Print the names of the Petitioner/Plaintiff and Respondent/Defendant in this box. Use the same names as are on the documents that you served.

First box, top of form, right side: Leave this box blank for the court's use.

Second box, right side: Print the case number in this box. The case number should be the same as the case number on the documents that you served.

Complete items 1–5 as follows:

1. You are stating that you are over the age of 18 and that you are not a party to this action. You are also stating that you either live in or are employed in the county where the mailing took place.
2. Print your home or business address.
3. Provide the date and place of the mailing and list the name of each document that you mailed. If you need more space to list the documents, check the box in item 3, complete the *Attachment to Proof of Service by First-Class Mail—Civil (Documents Served)* (form POS-030(D)), and attach it to form POS-030.
4. For item 4:

   Check box a if you personally put the documents in the regular U.S. mail.
   Check box b if you put the documents in the mail at your place of business.
5. Provide the name and address of each person to whom you mailed the documents. If you mailed the documents to more than one person, check the box in item 5, complete the *Attachment to Proof of Service by First-Class Mail—Civil (Persons Served)* (form POS-030(P)), and attach it to form POS-030.

At the bottom, fill in the date on which you signed the form, print your name, and sign the form. By signing, you are stating under penalty of perjury that all the information you have provided on form POS-030 is true and correct.

Exhibit 11

Roy R. Withers, Esq.
Law Office of Roy R. Withers
2802 Juan Street, Suite 12
San Diego, California 92110
Telephone: (619) 295-1305
Fax: (619) 297-9036

Attorney for Plaintiffs, CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

NORTH COUNTY DIVISION

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation, Plaintiffs, v. DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20,1999; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT, an individual; and DOES 1-25, inclusive, Defendants	Case No.: GIN 054897 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A NEW TRIAL** [CCP Sec. 657]

Plaintiffs submit these reasons a new trial should be granted.

I.
SURPRISE

A. A new trial should be granted because a surprise occurred at trial that materially affected Plaintiff's substantial rights against which ordinary prudence could not have guarded

A new trial is justified in this matter. A common ground for the granting of a new trial is on the ground of accident or surprise.

> On application of the original party, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted on all or some of the issue, on the grounds of accident or surprise, against which ordinary prudence could not have guarded, if substantial rights of the aggrieved party are materially affected thereby.
> *[CCP § 657 (3)]*

> The terms, accident and surprise, although not strictly synonymous, have substantially the same meaning, as each is used to denote some condition, or situation, in which a party to a cause is unexpectedly placed, to his or her injury, without any fault or negligence of his or her own, which ordinary prudence could not have guarded against.
> *[Kauffman vs. De Mutiis 31 Cal App 2nd, 429, 432, 189 2nd 271 (1948)]*

As the accompanying Declaration of Plaintiff, CLAYTON BLHEM, clearly shows, there was surprise. Until trial, Plaintiff did not know that attorney Clancy Wilson (who at one time represented both CLAYTON BLEHM as an individual* and DC SHOES, INC. as a corporation) had submitted a final settlement document to the IRS on August 14, 2003, six days before the signing of the Settlement Agreement between CLAYTON BLHEM and DC SHOES, INC. This document clearly showed that DC SHOES, INC. would not be negotiating the payment of withholding taxes on the part of CLAYTON BLEHM, the individual.

By virtue of CLAYTON BLEHM's Settlement Agreement with DC SHOES, INC., dated August 20, 2003, he had negotiated and agreed, as had DC SHOES, INC., that DC SHOES INC. would be responsible for all IRS levies and amounts due as a result of the BLEHM employment. BLEHM justifiably thought that this had been taken care of, as his counsel Pam Naughton also testified. Yet here, one week before, unknown to CLAYTON BLEHM, Clancy Wilson was adopting an opposite position with the IRS.

**Please See attached CHECK, 2 LETTERS, and pages 2-5 of RETAINER, none of which appeared at trial.*

It was not until Clancy Wilson's testimony on November 20 and November 26, 2007, that it was revealed that Clancy Wilson had communicated directly (August 14, 2003, at least) with the IRS regarding the settlement of DC SHOES, INC. only and was not including any settlement of CLAYTON BLEHM in that matter.

This placed Plaintiff, CLAYTON BLEHM, in an unexpected situation, substantially altering his position. Had CLAYTON BLEHM known of these facts, which came out at trial in 2003, before the close of escrow (May 1, 2004) of the sale of his 30% share in DC SHOES, INC., he would not have allowed the sale to have been completed until this condition precedent had been satisfied (or otherwise dealt with to his satisfaction, to minimize damaging impact).

B. It is also certain that a different result would be achieved if a re-trial is granted

> A new trial may be granted on the ground of accident or surprise if the aggrieved party shows that in the event of a new trial, a different result would be reached that would be favorable to that party.
> *[Whitfield vs. Debrincat 18 Cal App 2nd, 730, 738, 64 P. 2nd, 960 (1937)]*

The different result would clearly be achieved if the outrageous behavior of Clancy Wilson, who kept secret from CLAYTON BLEHM, in violation of fiduciary duty, the fact that he was submitting to the IRS settlement documents relative only to DC SHOES, INC. and not to CLAYTON BLEHM. Mr. Wilson owed a fiduciary duty to MR. BLEHM, if not as his present or former client, then as a major shareholder in DC SHOES, INC. to advise him of the status of the proceedings.

Mr. Wilson stated that MR. BLEHM was involved in litigation with Mr. Wilson's employer, DC SHOES, INC. However, this does not change the fact that CLAYTON BLEHM was affected both personally and as a shareholder by Mr. Wilson's actions on behalf of DC SHOES, INC. Had he known, Plaintiff could clearly have acted differently and not incurred the detriment that resulted thereafter, including this very lawsuit.

C. Plaintiffs exercised ordinary prudence in this regard

CLAYTON BLEHM exercised reasonable and ordinary prudence to guard against this surprise. He believed that Clancy Wilson would protect him personally for a number of reasons that include, but were not limited to, the fact that he was Wilson's client, that he was a major shareholder for the corporation for whom Wilson worked, and that he had an agreement with DC SHOES, INC. that he thought was iron-tight whereby DC SHOES would assume all liability incurred by either CLAYTON BLEHM or DC SHOES, INC. as a result of CLAYTON BLEHM'S employment status. He logically believed in these matters.

D. A failure to seek a continuance or relief at the time of surprise is not crucial

The surprise in Mr. Wilson's testimony was enormous. However, Plaintiffs cannot be judged by what they should have done in the pressure of trial, having been surprised.

> A new trial may be granted even though the aggrieved party failed to seek a continuance, or ask for relief at the time of the accident or surprise, if no practicable steps that counsel could have taken would have effaced the disastrous effect of accident or surprise.
> *(see Whitfield vs. Debrincat, supra)*

E. A new trial may be granted because of the raising of new material issues by representatives of an adverse party

Mr. Wilson was the tax attorney for DC SHOES, INC., representing them before the IRS. CLAYTON BLEHM also thought Mr. Wilson was representing his interest because of the previously mentioned Settlement Agreement with DC SHOES, INC. and his retainer agreement.

> A new trial may be granted on the ground of accident or surprise if, during the trial, the adverse party raises a new issue that did not appear in the pleadings, and that is supported by testimony contrary to what was anticipated.
> *[Blankman vs. Parsons 73 Cal App 218, 224-225, 238 P. 2nd 728 (1925)]*

As is shown by the Declaration of CLAYTON BLHEM, attached hereto, and the records in this matter, there was never an issue regarding Clancy Wilson's deal with the IRS before the signing of the BLEHM/DC SHOES settlement and the close of the escrow with DC SHOES, INC. and QUIKSILVER, INC. Had Plaintiff, CLAYTON BLEHM, known of this agreement with the IRS in August of 2003, he would never have allowed the sale to go through without this issue being properly dealt with. Had this issue been dealt with, the entire trial in January of 2008 would have been unnecessary, as CLAYTON BLEHM would have suffered no harm. This new testimony was revealed at trial.

II.

NEWLY DISCOVERED EVIDENCE

A. A new trial should be granted because there is newly discovered evidence that is material for Plaintiffs, which they could not, with reasonable diligence produced at trial; thus the substantial rights of Plaintiffs have been materially affected

As stated, in the area of accident/surprise, Plaintiffs were completely unaware of what Mr. Wilson would testify to regarding his dealings with the IRS before the agreement between BLEHM and DC SHOES and the sale to QUIKSILVER, INC. was finalized.

> On application of the party aggrieved, the verdict or decision may be vacated, in whole or in part, and a new trial may be granted, on all or some of the issues, on the ground of newly discovered evidence, material for the party making the application, that he or she could not, with reasonable diligence, have discovered and produced at trial, if substantial rights of the aggrieved party are materially affected thereby.
> [CCP § 657 (4)]

As has been discussed earlier, the surprise was the newly discovered evidence revealed in the testimony of DC SHOES, INC.'s tax attorney, Mr. J. Clancy Wilson. Mr. Wilson testified in the letter of June 4, 2002 sent to CLAYTON BLEHM, that the IRS proposed tax liabilities in the total amount of $1,661,771.12. He next sent the summary of audits to Mr. BLEHM.

Later on July 19, 2002, Mr. Wilson's assistant Mr. Reid sent a letter both to the IRS and to CLAYTON BLEHM saying that he could no longer represent CLAYTON BLEHM (evidently because he did not believe in what was happening to MR. BLEHM). Mr. Wilson sent no such letter.

However, in August Mr. Wilson sent to the tax court a new settlement proposal that totally omitted any discussion of settling for CLAYTON BLEHM—only with DC SHOES, INC. This was kept secret from CLAYTON BLEHM even though he was a client, major shareholder in DC SHOES, INC., and was in the process of fashioning a Settlement Agreement with DC SHOES, INC. whereby DC SHOES assumed all tax liability as a result of CLAYTON BLEHM'S employment with DC SHOES, INC.

All of this was new.

> In order for a trial court to grant a new trial on the ground of newly discovered evidence, it must satisfactorily appear that reasonable diligence was used to discover and produce the evidence at trial; that the newly discovered evidence is merely not cumulative; and that it may be reasonably inferred that the result of the trial may have been different if the newly discovered evidence had been presented at trial.
> *[Cahill vs. E. B. & A. L. Stone Company 167 Cal App 126, 133, 138 P. 712 (1914); see Schultz vs. Methias 3 Cal App 3rd, 904, 909-910, 83 Cal Rprtr 888 (1970)]*

Further, as has been discussed earlier, this was a surprise. This evidence related by Mr. Wilson was completely newly discovered.

It is clear that reasonable diligence was used. There was a Settlement Agreement with DC SHOES, INC. which Plaintiff, CLAYTON BLEHM reasonably believed would be executed. The intent when BLEHM made that agreement was clear: DC SHOES, INC. was to take care of all tax liabilities to either CLAYTON BLHEM or DC SHOES, INC. resulting from

CLAYTON BLEHM'S employment. He did not know that they would not satisfy that requirement. CLAYTON BLEHM dismissed his lawsuit against DC SHOES, INC., in reliance on this.

Clearly the result of the trial would have been different had Plaintiff known. CLAYTON BLEHM would have handled things much differently had he known that Mr. Wilson has submitted settlement documents to the IRS *only* on behalf of DC SHOES, INC.

B. This evidence was newly discovered and not available to Plaintiff at the time of trial

> Evidence discovered if it was not available at the time of trial and could not have been discovered with reasonable diligence. *[Anderson v. Howland 3 Cal App 3rd, 380, 384, 83 Cal Rprtr 308 (1970); Dasso vs. Bradbury 39 Cal App 2nd, 712, 717, 104 P. 2nd 128 (1940)]*

This has been discussed, supra. No exercise of reasonable diligence could have revealed this information. Plaintiffs were of the understandable belief that Mr. Wilson would protect their interests as they were also the interests of DC SHOES, INC. CLAYTON BLEHM was a client, he was a one-third (1/3) shareholder in DC SHOES, INC., and further, there was a Settlement Agreement that was being negotiated, in bad faith, at the time Clancy Wilson was talking to the IRS.

III.
MISTAKE OF LAW

A. A new trial should be granted on the ground of error in law occurring at trial and excepted to by the party making this application, because the court erroneously admitted evidence at trial, thus materially affecting Plaintiff's substantial rights

On a number of occasions during the cross examination of Plaintiff, CLAYTON BLEHM, the court allowed evidence to be admitted that should logically and fairly been omitted as being too prejudicial on the grounds of relevance and Evidence Code Section 352 (b) as overly prejudicial.

> The trial court's erroneous ruling on the admission of certain evidence is an error in law for which a new trial may be granted if the evidence submitted is not sufficiently probative and results in prejudice to the aggrieved party.
> *[Richard v. Scott 79 Cal App 3rd 57, 63-64, 144 Cal Rprtr 672(1978)]*

In this instance the court allowed evidence of MR. BLEHM'S Amended Tax Returns which was overly predjudicial in that it showed the jury that CLAYTON BLEHM had made large amounts of money and that he was having to file an Amended return based upon an IRS assessment that he was an employee of DC SHOES, INC., rather than an Independent Contractor employed by his own corporation, FDC INVESTMENTS, INC. This made CLAYTON BLEHM not the victim that he is, but rather as a tax-cheat and abuser, garnering little or no sympathy with the jury (found at Reporter's Transcript, November 8, 2007; page 172, lines 7-8, 7-13; page 174, line 18-22; page 175, line 25-28; page 176, line 27-28/page 177 line 1-3).

Additionally, based upon a Motion in Limine, it was decided that no evidence of PLAINTIFF'S tax returns would be admitted. However, these amended tax returns, along with all the information that was contained in original tax returns was so admitted, and as such was an error in law as overly predjudicial pursuant to the provisions of Evidence Code Section 352 (b).

> If an error of law has occurred, in the omission or objection of evidence, the trial court may consider all of the circumstances surrounding the ruling, including the weight the may be accorded to the requested evidence, the attitude of the interrogator, and any other fact attempting to show the importance of the admission or rejection of the evidence.
> *[De Victoria v. Erickson 83 Cal App 2nd, 206, 208-209, 188 P. 2nd 276 (1948)]*

The admission of the foregoing is an example of what occurred to make Plaintiff, CLAYTON BLEHM far from the victim he is in this matter, but rather the "bad actor". The Motion in

Limine excluding CLAYTON BLEHM'S tax return was granted for a reason. They would be overly predjudicial. That was also an argument used by the defense in the desired exclusion of Exhibit 217.

The court's exclusion of exhibit 217 was erroneous. The court was originally asked to take judicial notice of this matter (Reporter's Transcript, November 8, 2007, page 93, line 11-17). The defense objected strenuously (Reporter's Transcript, page 94, line 7-11). Those excerpts to defense protest to exhibit 217 (IRS Notice of Levy) was that it was overly prejudicial and hearsay. After lengthy discussions, which argument continued to Reporter's Transcript, page 115.

The result was that (on page 115, lines 17-27) that exhibits 200, 201, and 202 were introduced instead. Once again, it was argued that exhibit 214—the Notice of Levy—was overly predjudicial and hearsay. The court's consistency in this regard was then challenged because of the foregoing introduction of CLAYTON BLEHM'S tax returns.

CONCLUSION

For all of the reasons here submitted, PLAINTIFFS respectfully request this court grant a new trial because of the issues presented.

IT IS SO MOVED.

LAW OFFICES OF ROY R. WITHERS

Dated: 7/14/08

Roy R. Withers, Esq.
Attorney for Plaintiffs CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation, moving parties

RECORDED SIDEBAR CONFERENCE OUTSIDE YOUR PRESENCE. AND WE WILL RETURN MOMENTARILY. AGAIN, PLEASE FEEL FREE TO STAND UP, TALK AMONG YOURSELF. DO NOT TALK ABOUT THE CASE, AND DO NOT TALK TO ANY WITNESSES OR COURT EMPLOYEES OTHER THAN DEPUTY SHERIFF HARDING.

(THE FOLLOWING DISCUSSION TOOK PLACE AT SIDEBAR OUT OF THE HEARING OF THE JURY.)

THE COURT: ALL RIGHT. WE'RE ON THE RECORD ON BLEHM VERSUS DC SHOES OUTSIDE THE PRESENCE OF THE JURY PANEL. COUNSEL IS PRESENT. THE PARTIES ARE NOT.

THIS ISSUE, AS I UNDERSTAND IT -- PLEASE FEEL FREE TO CORRECT ME IF I'M WRONG -- THE ISSUE, AS WE HAVE IT NOW, IS THAT THERE WAS A REQUEST FOR JUDICIAL NOTICE FILED, I BELIEVE, AT OR ABOUT THE FIRST DAY OF TRIAL IN THIS MATTER. AND IT DID INVOLVE A COPY OF EXHIBIT K, WHICH IS NOW COURT'S EXHIBIT 217 FOR IDENTIFICATION. AND THERE WAS AN OPPOSITION FILED --

THE CLERK: TODAY.

THE COURT: -- TODAY --

MR. YODER: THIS MORNING.

THE COURT: -- AS IT RELATES TO COURT'S EXHIBIT 217 FOR IDENTIFICATION.

MS. MAGNUSON: WE DID FILE AN OPPOSITION THIS MORNING, YOUR HONOR.

THE COURT: YES, YOU DID.

MS. MAGNUSON: AND WITH RESPECT TO THIS DOCUMENT, IN PARTICULAR, WE'RE NOT CHALLENGING PLAINTIFFS' QUESTION THAT THE COURT TAKE JUDICIAL NOTICE OF THE DOCUMENT. IN OUR

OPPOSITION WE ADDRESSED SEPARATE DOCUMENTS ON THAT BASIS.

THE COURT: RIGHT.

MS. MAGNUSON: BUT WITH REGARD TO THIS DOCUMENT, SPECIFICALLY, THE NOTICE OF LEVY THAT PLAINTIFF IS NOW PROPOSING BE ADMITTED --

THE COURT: CORRECT.

MS. MAGNUSON: -- SPECIFICALLY THE ADMISSIBILITY OF THE DOCUMENT, FIRST ON THE BASIS THAT IT CONSTITUTES INADMISSIBLE HEARSAY, IT'S CLEARLY BEING OFFERED FOR THE TRUTH OF WHAT'S IN THOSE DOCUMENTS. SECOND, IT'S COMPLETELY --

THE COURT: WELL, LET ME ASK YOU THIS, MS. MAGNUSON. IF I CAN TAKE JUDICIAL NOTICE OF IT, DOES THAT NOT CONSTITUTE, IN A SENSE, AN EXCEPTION TO ANY HEARSAY OBJECTION?

MS. MAGNUSON: NO, IT DOESN'T.

THE COURT: TELL ME WHY IT DOES NOT.

MS. MAGNUSON: JUST THE COURT TAKING JUDICIAL NOTICE OF A DOCUMENT DOESN'T ESTABLISH ITS ADMISSIBILITY OF THE TRUTH OF WHAT'S IN THERE. YOU CAN TAKE JUDICIAL NOTICE, FOR EXAMPLE, OF THE FACT THAT A COMPLAINT WAS FILED. YOU DON'T HAVE TO TAKE JUDICIAL NOTICE OF THE ALLEGATIONS WITHIN THOSE COMPLAINTS, THE TRUTH OF THE ALLEGATIONS IN THOSE COMPLAINTS. I THINK, MORE IMPORTANTLY, THE DOCUMENTS --

THE COURT: EXCUSE ME WHILE I SIT.

MS. MAGNUSON: THE SUBSTANCE OF THE DOCUMENT IS IRRELEVANT. PLAINTIFF HAS TESTIFIED THAT HE HAS NOT PAID

WANTS TO DO OR PROCEED IN THAT FASHION AND YOU WANT TO ASSIST HIM IN THAT REGARD, I'LL BE HAPPY TO ACCOMMODATE YOU.

MR. CAMPITIELLO: THANK YOU, YOUR HONOR. I WILL DO THAT.

THE COURT: I NEED TO DEAL WITH EACH EXHIBIT AS I SEE IT ON AN INDIVIDUAL BASIS, AND THAT'S NOT TO SAY I HAVE A DIFFERENT RULING FOR COURT'S EXHIBIT 200 THROUGH 201 OR 202. I DON'T KNOW UNTIL THEY'RE OFFERED.

BUT ANYTHING FURTHER, GENTLEMEN?

MR. CAMPITIELLO: I DON'T THINK SO, YOUR HONOR.

MR. YODER: NO, YOUR HONOR.

THE COURT: ALL RIGHT. DO YOU WANT TO OFFER -- DO YOU WANT TO OFFER THOSE EXHIBITS AT THIS TIME OUTSIDE THE PRESENCE OF THE JURY, OR WOULD YOU RATHER DO IT IN FRONT OF THE JURY?

MR. CAMPITIELLO: I'M HAPPY TO -- EXCUSE ME. I'M HAPPY TO OFFER THEM NOW, YOUR HONOR.

THE COURT: ALL RIGHT. AND WHAT ARE THE EXHIBIT NUMBERS AGAIN, MR. YODER?

MR. YODER: IT'S 200, 201 AND 202.

THE COURT: ANY OBJECTION TO THOSE, MR. YODER?

MR. YODER: IN LIGHT OF THE COURT'S RULING RE: THE ADMISSIBILITY OF EXHIBIT 217, WE WILL NOT OBJECT TO THE INTRODUCTION OF EXHIBITS 200, 201 AND 202, BUT WE DO SO REALLY TO MITIGATE WHAT WE SEE AS THE DAMAGE OF ALLOWING EXHIBIT 217 INTO EVIDENCE.

THE COURT: AND I UNDERSTAND THAT AND APPRECIATE IT,

A YES.

MR. YODER: OKAY. IF WE COULD GO AHEAD AND PUT THAT UP?

YOUR HONOR, I WOULD MOVE EXHIBIT 56 INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MR. CAMPITIELLO: YES, YOUR HONOR. I OBJECT ON THE BASIS OF RELEVANCE AND SECTION 352(B).

MR. YODER: I WOULD POINT OUT, YOUR HONOR, THESE ARE THE AMENDED RETURNS.

THE COURT: OBJECTION AS TO RELEVANCE AND THE OBJECTION UNDER EVIDENCE CODE SECTION 352(B) IS OR, RATHER, ARE OVERRULED. THEY'LL BE RECEIVED.

MR. YODER: THANK YOU, YOUR HONOR.

(RECEIVED IN EVIDENCE: COURT'S NO. 56)

MR. YODER: IF WE COULD PUT UP THE FIRST PAGE OF EXHIBIT 56?

BY MR. YODER:

Q WHAT I WOULD LIKE TO DO RIGHT NOW, MR. BLEHM, IS TALK ABOUT WHAT HAPPENED BACK IN 1998, 1999 AND 2000 WHEN THE RETURNS WERE INITIALLY FILED. AND ON THIS RETURN, THIS AMENDED RETURN, IT DOES INCLUDE, AMONG OTHER INFORMATION, INFORMATION FROM THE ORIGINAL RETURN THAT WAS FILED IN 1998, CORRECT?

A I PRESUME SO.

Q WELL, IF YOU'D LOOK AT THE FIRST PAGE.

MR. YODER: AND IF WE COULD CALL OUT JUST THE VERY TOP PORTION, ONE, TWO, THREE AND FOUR.

A 35,000 -- $35,028.

Q THAT'S NOT THE TAX THAT WAS PAID. THAT'S JUST THE TAXABLE INCOME THAT WAS REPORTED, CORRECT?

A YES.

Q LOOK AT EXHIBIT 57. I'M SORRY. NOT 57. EXHIBIT 59, IF YOU WOULD.

(EXHIBIT 59 IDENTIFIED.)

THE WITNESS: ALL RIGHT.

BY MR. YODER:

Q IS THIS THE AMENDED TAX RETURN FOR FDC FOR THE FISCAL YEAR ENDING JUNE OF 1999?

A 1999, ENDED JUNE 30TH.

Q AND THIS IS THE AMENDED RETURN THAT COVERS THAT PERIOD OF TIME FOR FDC?

A YES.

MR. YODER: YOUR HONOR, I WOULD MOVE EXHIBIT 59 INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MR. CAMPITIELLO: YES, YOUR HONOR. OBJECTION ON THE BASIS OF RELEVANCE AND SECTION 352.

THE COURT: BOTH OBJECTIONS ARE OVERRULED. IT WILL BE RECEIVED AS COURT'S EXHIBIT 59.

(RECEIVED IN EVIDENCE: COURT'S NO. 59)

BY MR. YODER:

Q THIS AMENDED RETURN FOR 1999, SIMILAR TO THE RETURN WE JUST LOOKED AT, ALSO REPORTS THE AMOUNT OF INCOME THAT WAS REPORTED BY FDC IN THE ORIGINAL RETURN, IN THIS CASE THE RETURN THAT WAS FILED FOR THE YEAR 1999, CORRECT?

A YES.

Q WHAT WAS THE AMOUNT OF INCOME THAT WAS ORIGINALLY REPORTED BY FDC?

A $811,227.

Q AND AGAINST THAT INCOME, WHAT WAS THE AMOUNT OF DEDUCTIONS THAT WERE CLAIMED BY FDC?

A 788,077.

Q SO FOR 1999 HOW MUCH TAXABLE INCOME WAS REPORTED BY FDC?

A $22,150.

(EXHIBIT 62 IDENTIFIED.)

BY MR. YODER:

Q LOOK, IF YOU WOULD, AT EXHIBIT 62. IT SHOULD BE IN THE NEXT BINDER, MR. BLEHM.

A I HAVE IT.

Q YOU HAVE EXHIBIT 62 IN FRONT OF YOU?

A YES.

Q AND EXHIBIT 62 IS THE AMENDED U.S. CORPORATION INCOME TAX RETURN FOR FDC FOR THE YEAR ENDING JUNE OF 2000, CORRECT?

A YES.

MR. YODER: AND, YOUR HONOR, I WOULD MOVE EXHIBIT 62 INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MR. CAMPITIELLO: YES, YOUR HONOR. FOR THE RECORD, RELEVANCE AND 352.

THE COURT: OBJECTIONS ARE OVERRULED. COURT'S EXHIBIT 62 FOR IDENTIFICATION WILL BE RECEIVED.

(RECEIVED IN EVIDENCE: COURT'S NO. 62)

BY MR. YODER:

Q FOR THIS RETURN, AS WITH THE CASE OF THE PRIOR TWO RETURNS, MR. BLEHM, AGAIN, IT SHOWS THE INCOME THAT WAS ORIGINALLY REPORTED BY FDC IN ITS ORIGINAL U.S. CORPORATION INCOME TAX RETURN FOR THE YEAR ENDING JUNE 2000, CORRECT?

A YES.

Q AND WHAT WAS THE AMOUNT OF TOTAL INCOME THAT WAS ORIGINALLY REPORTED BY FDC FOR THAT YEAR?

A 943,428 OR FIVE. I'M NOT SURE.

Q AND AS AGAINST THAT TOTAL INCOME OF SLIGHTLY OVER $943,000, WHAT AMOUNT OF DEDUCTIONS DID FDC CLAIM?

A $932,749.

Q LEAVING TOTAL TAXABLE INCOME FOR THAT YEAR IN WHAT AMOUNT?

A $10,679.

(EXHIBIT 63 IDENTIFIED.)

BY MR. YODER:

Q LOOK AT EXHIBIT 63, IF YOU WOULD.

A YES.

Q IS EXHIBIT 63 A TRUE AND CORRECT COPY OF THE AMENDED U.S. CORPORATION INCOME TAX RETURN FOR FDC FOR THE TAX YEAR ENDING JUNE OF 2001?

A YES.

MR. YODER: YOUR HONOR, I WOULD MOVE INTO EVIDENCE EXHIBIT 63.

THE COURT: ANY OBJECTION?

MR. CAMPITIELLO: SAME OBJECTIONS, YOUR HONOR:

RELEVANCE AND SECTION 352.

THE COURT: THOSE OBJECTIONS ARE OVERRULED. IT WILL BE RECEIVED.

(RECEIVED IN EVIDENCE: COURT'S NO. 63)

BY MR. YODER:

Q MR. BLEHM, JUST TO KEEP THE CHRONOLOGY STRAIGHT, AS AN INDIVIDUAL YOU WERE FILING TAX RETURNS, AS ALL INDIVIDUALS DO, ON A CALENDAR YEAR BASIS SO FOR THE PERIOD OF TIME COVERING JANUARY 1 THROUGH DECEMBER 31, CORRECT?

A YES.

Q WITH RESPECT TO FDC, THOUGH, THE TAX RETURNS WERE FILED FOR A DIFFERENT 12-MONTH PERIOD OF TIME, CORRECT?

A YEAH. FISCAL YEAR.

Q OKAY. IF I COULD ASK YOU TO WAIT UNTIL I FINISH MY QUESTION, JUST SO THE REPORTER CAN MAKE SURE SHE GETS A CLEAR ANSWER, AND WE'RE NOT SPEAKING OVER EACH OTHER.

FOR FDC, THEN, THE RETURNS WERE FILED ON THE BASIS OF A FISCAL YEAR, NOT A CALENDAR YEAR, CORRECT?

A YES.

Q AND THE FISCAL YEAR FOR FDC ENDED JUNE 30 OF EACH YEAR?

A YES.

Q SO THESE RETURNS WE'RE LOOKING AT ARE COVERING ESSENTIALLY A JULY 1 TO JUNE 30 TIME PERIOD?

A THAT'S RIGHT.

Q AND SO FOR THIS RETURN, FOR 2001, IT'S COVERING JULY 1 OF 2000 THROUGH JUNE 30TH, 2001?

A YES.

10250

DC INVESTMENTS, INC.

BRANTON & WILSON, APC **October 23, 2001** **Check No. 10250**

Document No.	Document Date		Amount	Discount	Net Amount
RETAINER02	10/15/01	RETAINER - CLAYTON D. BLEHM	500.00	0.00	500.00

Total 500.00

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10250

FDC INVESTMENTS, INC.
770 SYCAMORE AVE., #J-213
VISTA, CA 92083

25-80/440

10250

**** FIVE HUNDRED AND 0/100

DATE October 23, 2001

AMOUNT ********* 500.00

PAY TO THE ORDER OF
BRANTON & WILSON, APC
ATTORNEYS AT LAW
701 B STREET, SUITE 1255
SAN DIEGO, CA 92101-8187

Clayton D. Blehm
AUTHORIZED SIGNATURE

THE REVERSE SIDE OF THIS DOCUMENT INCLUDES AN ARTIFICIAL WATERMARK - HOLD AT AN ANGLE TO VIEW

⑈010250⑈ ⑆044000804⑆ 041171054092⑈

PURCHASE INVOICE
10/23/01 4:56:25 PM CBLEHM

Vendor Invoice No.: **RETAINER02**
Purchase Invoice Date: 10/15/01

Control Number: **10258**
Page: 1

To:
BRANTON & WILSON, APC
ATTORNEYS AT LAW
701 B STREET, SUITE 1255
SAN DIEGO, CA 92101-8187

Ship To:

Ship Via:
Receive By:
Terms:
P.O. Number: of:

Confirm To:
Buyer: CLAYTON BLEHM
Phone: (760) 599-2999
Vendor: 10074

Item ID	Description	Unit	Quantity	Unit Price	Total Price
	LEGAL SERVICES/CDB RETAIN	EA	1	500.00	500.00

Total Quantity: 1

Subtotal:	500.00
Invoice Discount:	0.00
Sales Tax:	0.00
Total:	500.00

BRANTON & WILSON
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
701 B STREET, SUITE 1255
SAN DIEGO, CALIFORNIA 92101-8187

LAWRENCE S. BRANTON *
J. CLANCY WILSON *
MICHAEL N. TAYLOR
W. ALAN LAUTANEN
HENRY J. KLINKER
KENT W. HILDRETH**
RANDALL B. KLOTZ
LAURELANN K. BUNDENS **
TIMOTHY G. RILEY **
JAMES H. SIEGEL **
SHIRLEY L. KOVAR **
STEPHEN L. WALDMAN
KARL A. RAND
DAVID P. RUTH
HEATHER DUNCAN
STEVEN E. COWEN

CERTIFIED SPECIALIST
* TAXATION LAW
** ESTATE PLANNING, TRUST & PROBATE LAW
THE STATE BAR OF CALIFORNIA
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E-MAIL: BrantonWil@aol.com

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(619) 234-9870

FILE NO.
8647.02

PRIVILEGED AND CONFIDENTIAL

October 15, 2001

Clayton D. Blehm, CPA
770 Sycamore Avenue, J-213
Vista, California 92083

Dear Mr. Blehm:

As we discussed on Wednesday, October 10, 2001, I am enclosing one original and one copy of our fee agreement which describes our mutual obligations, should you wish us to undertake your representation.

I have signed the agreement, indicating the firm's willingness to assume your representation upon the terms and conditions described. If the fee agreement letter meets with your approval, after your careful review, please execute the original agreement and return it to me in the enclosed pre-addressed envelope with a check for the requested retainer of $500. Retain the copy for your personal records.

As with your other matters involving your business, we will endeavor to provide excellent legal services on a timely basis. If at any time you have any questions regarding our work, please do not hesitate to give me a call.

Sincerely yours,

J. CLANCY WILSON

JCW:jlh
Enclosures: Fee agreement letter (2)
Return envelope

C:\Clients 3\DC Shoes 8647.02 Blehm\fee cover ltr.wpd

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FILE NO.
8647.02

October 15, 2001

Clayton D. Blehm, CPA
770 Sycamore Avenue, J-213
Vista, California 92083

Re: Fee Agreement For Legal Services

Dear Mr. Blehm:

This letter supplements our engagement by DC Shoes, Inc. We are pleased to represent you individually in connection with the tax matters described below.

This letter will summarize the terms for our professional services and describe other important aspects of the attorney-client relationship. We believe that a clear understanding of such matters is helpful in maintaining a harmonious, professional relationship. Consequently, I encourage you to pursue with us any questions you may have and to consider carefully the matters set forth in this letter. This letter will serve as our agreement concerning the manner in which services are to be rendered and payment is to be made.

Scope of Work

We will act as legal counsel to represent you in connection with the Internal Revenue Service examination of your tax returns. The scope of our work will include all administrative representation before the Internal Revenue Service, including the IRS Office of Appeals. If the IRS examination progresses to litigation in any court, we would be pleased to provide representation under a separate fee agreement and terms to be discussed if and when the litigation becomes necessary.

Our firm maintains a policy of professional liability insurance which would apply to any errors or omissions with regard to the services contemplated by this letter, subject to the terms of the policy itself, including without limitation, limits on the amount of coverage.

to resolve this matter and our comments regarding such matters are the expression of opinion only. Should you have any questions about our practices or procedures, please let me know as soon as possible.

If the terms set forth in this letter are agreeable to you, please indicate your approval and acceptance by executing and returning this letter in the envelope provided. A copy of this letter signed on behalf of the firm is enclosed for your records.

Sincerely yours,

BRANTON & WILSON, APC

Clancy Wilson

By: J. CLANCY WILSON

JCW:jlh

I (WE) HAVE APPROVED AND ACCEPTED THIS FEE AGREEMENT.

DATED THIS 23rd DAY OF October, 2001.

By: Clayton D. Blehm
CLAYTON D. BLEHM

Fees for Services

Each of the lawyers in our firm has, through experience or training, developed certain expertise. In the interest of promoting efficiency and cost savings to our clients, it is our practice, as time and work schedules permit, to refer matters internally to those individuals who can perform the highest quality work at the lowest cost. In addition to attorneys, we employ staff members who are not licensed to practice law but who are capable of performing legally related tasks under the supervision of a licensed attorney. We have found that this procedure facilitates the rapid and efficient rendering of services. I encourage you to discuss with me any questions or problems you may have at any time.

Our fees for legal services depend on a variety of factors. Fees for members of our firm range from $85 for our legal assistants to $275 for our senior attorneys. In this case, I will assume principal responsibility for reviewing your file. My hourly rate is currently $275.00. From time to time we may increase the hourly rates charged by members of this firm. Although we have no present plans to increase our hourly rates, we may do so from time to time. Any such increases will be reflected on your monthly billing statements. By retaining our firm, you are agreeing to pay our fees at our present hourly rates and at any increased hourly rates, unless you provide written objection within 30 days of any billing reflecting such increased rates.

In addition to fees for our services, it may be necessary to incur certain costs and expenses on your behalf for which you will be responsible. Such expenses may include, but are not limited to, photocopying charges, court filing fees, transcript costs, travel, postage, long-distance telephone costs, facsimile charges, and messenger service charges. These costs will be added to the statement for the month in which such expenses are recorded in our billing system.

Requested Retainer

It is the firm's policy to require a retainer before commencing work on matters undertaken for a new client. After a review of the information you provided, we request you provide a retainer of ~~$15,000~~ $5,000 as a reserve against future legal services and costs incurred on your behalf. This retainer will be held in our trust account for your benefit. Unless we receive notification to the contrary by the third day following the mailing of our monthly statement to you, we will withdraw funds from the trust account in an amount equal to the charges for services rendered and costs incurred in the preceding monthly billing period. Any withdrawals made from our trust account will be reflected on your next monthly statement.

By signing this letter you agree to replenish the retainer if we believe that the balance is insufficient to cover the payment for future services and costs. At no time, however, should the retainer fall below $500. The unused portion of your retainer will be returned upon completion or termination of our services.

Monthly Statements

Our standard practice is to bill on a monthly basis. We have found that this procedure allows our clients to monitor both current and cumulative legal fees. Our statements will be for services performed for the monthly billing period which ends on the 25th day of the preceding month. In addition, our monthly statement will itemize the actual costs incurred on your behalf and will describe the sums withdrawn from your trust account, if any, in payment of all services rendered and costs incurred.

Statements are usually mailed within the first 10 days of the month and, unless otherwise agreed in writing, all sums due shall be delinquent if not paid within thirty (30) days of the date of the monthly statement. We reserve the right, as we do with all of our clients, to suspend or terminate any work in progress in the event timely payment is not made. We will expect you to arrange your review and handling of our monthly statements so as to meet such payment deadline on a timely basis. Moreover, if, during the course of our representation, billing issues arise and remain unresolved, we reserve the right to withdraw from further representation. In that instance, you agree to execute a written consent to such withdrawal, at our request, to evidence the agreement as outlined above. DELINQUENT SUMS SHALL BE SUBJECT TO A LATE CHARGE OF 1.5% PER MONTH UNTIL PAID.

Termination

Both you and our firm have the right to terminate our fee agreement upon written notice. Specifically, you have the right to discharge our firm for any reason, as long as you provide us with reasonable written notification. Our firm has the right to withdraw from your representation if (1) you fail to cooperate with us in a manner which we deem satisfactory, (2) you do not timely pay any monthly billing statement or replenish the retainer, (3) you do not give written consent to any increase in our fees or charges, or (4) in our opinion, it is impractical to continue our representation. We will provide you with reasonable written notice of our intention to withdraw.

You also have the right to discharge us for any reason upon reasonable written notice of our withdrawal or discharge by you. Our firm shall nevertheless be entitled to receive a sum equal tothe number of hours worked on your case times the applicable hourly billing rate, plus reimbursement for costs advanced.

Arbitration

We appreciate the opportunity to serve as your attorneys and anticipate a productive, harmonious relationship. If you become dissatisfied for any reason with the services we have performed or the fees charged, we encourage you to bring that to our attention immediately. If we perceive a problem with the representation, we will discuss it with you. Most such problems should be rectified by communication and discussion. However, a dispute could arise between us which cannot be resolved by negotiation. We believe that such attorney-client disputes are most satisfactorily resolved through binding arbitration than by litigation in court.

Arbitration is a process by which both parties to a dispute agree to submit the matter to a retired judge or other arbitrator who has the expertise in the area, and to abide by the arbitrator's decision instead of litigating in court; in arbitration, there would be no right to a trial and the arbitrator's legal and factual determinations are generally not subject to appellate review; arbitration rules of evidence and procedure are often less formal and rigid than in a court trial; arbitration usually results in a decision much more quickly than proceedings in court, and the attorney's fees and other costs incurred by both sides are substantially less.

Both the United States and California Supreme Courts have endorsed arbitration as an accepted and favored method of resolving disputes, because it is economical and expeditious. Arbitration is also less acrimonious and more confidential than traditional litigation and is therefore particularly suited to resolution of disputes between attorneys and their clients. *Your agreement to arbitrate disputes is not a condition of our agreeing to represent you, and if you do not wish to agree to arbitrate, you should advise us before signing this letter so that we can delete this section of the agreement.* You are encouraged to discuss the advisability of arbitration with us, with other independent counsel or any of your other advisors.

By signing this letter, you agree that, if any dispute arises out of or relates to this agreement, our relationship, or the services performed (including but not limited to disputes regarding attorney's fees or costs, and claims of negligence, breach of contract or fiduciary duty, fraud or any claim based upon a statute or the scope of matters to be arbitrated), such dispute shall be resolved without a trial by submission to binding arbitration in San Diego County, California, before a retired judge or justice. If we are unable to agree on a retired judge or justice, each party will name one retired judge or justice and the two named persons will select a neutral judge or justice who will act as the sole arbitrator.

The parties shall be entitled to take discovery in accordance with Section 1283.05 of the California Code of Civil Procedure, and either party may request that the arbitrator limit the amount or scope of such discovery. In determining whether to limit discovery, the arbitrator shall balance the need for the discovery against the parties' mutual desire to resolve disputes expeditiously and inexpensively.

Conclusion

We look forward to working with you regarding your tax matters described above. Please understand that we cannot make any guarantee or promise concerning the outcome or time necessary to resolve this matter and our comments regarding such matters are the expression of opinion only. Should you have any questions about our practices or procedures, please let me know as soon as possible.

If the terms set forth in this letter are agreeable to you, please indicate your approval and acceptance by executing and returning this letter in the envelope provided. A copy of this letter signed on behalf of the firm is enclosed for your records.

Sincerely yours,

BRANTON & WILSON, APC

Clancy Wilson

By: J. CLANCY WILSON

JCW:jlh

I (WE) HAVE APPROVED AND ACCEPTED THIS FEE AGREEMENT.

DATED THIS 23rd DAY OF October, 2001.

By: Clayton D. Blehm
CLAYTON D. BLEHM

Exhibit 12

Roy R. Withers, Esq.
Law Office of Roy R. Withers
2802 Juan Street, Suite 12
San Diego, California 92110
Telephone: (619) 295-1305
Fax: (619) 297-9036

Attorney for Plaintiffs CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

NORTH COUNTY DIVISION

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation,

Plaintiffs,

v.

DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20,1999; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT, an individual; and DOES 1-25, inclusive,

Defendants

Case No.: GIN 054897

NOTICE OF APPEAL [CALIFORNIA RULES OF COURT, RULE 1(a)]

NOTICE IS HEREBY GIVEN that PLAINTIFFS appeal from the judgment entered herein on January 4, 2008, stating that all of PLAINTIFFS' claims against DEFENDANTS were to be dismissed and PLAINTIFF was to be awarded nothing.

LAW OFFICES OF ROY R. WITHERS

Dated: 7/02/08

Roy R. Withers, Esq.
Attorney for CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 2802 Juan Street, Suite 12, San Diego, California 92110.

On July 3, 2008, I served the following documents on the interested parties in this action:

NOTICE OF APPEAL

[ ] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing ( ) the original **(X)** a true copy thereof enclosed in a sealed envelope addressed as follows:

O'Melveny & Meyers LLP
ATTN: Michael G. Yoder
610 Newport Center Drive; Suite 1700
Newport Beach, CA 92660-6429

[X] by mail as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on the same day with postage thereon fully prepaid, at San Diego, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[ ] by personal service as follows: I delivered said document(s) by hand to:

[ ] by facsimile as follows: I sent a copy of the document(s) listed above to ____________________ (___) - __________ at _______ a.m./p.m.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I further declare that I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed this 3rd day of July, 2008 at San Diego, California.

MEGAN WECKESSER

Exhibit 13

MICHAEL G. YODER (S.B. #83059)
MOLLY J. MAGNUSON (S.B. #229444)
DANIEL S. ROBINSON (S.B. #244245)
O'MELVENY & MYERS LLP
610 Newport Center Drive, Suite 1700
Newport Beach, CA 92660-6429
Telephone: (949) 760-9600
Facsimile: (949) 823-6994
Email addresses: myoder@omm.com
mmagnuson@omm.com
dsrobinson@omm.com

Attorneys for Defendants
DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 and BRIAN WRIGHT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation, Plaintiffs, v. DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT, an individual; and DOES 1 through 25, inclusive, Defendants.	Case No. GIN 054897 **DEFENDANTS' NOTICE OF MOTION AND MOTION TO STRIKE PLAINTIFFS' UNTIMELY FILED MOTION FOR NEW TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF MOLLY J. MAGNUSON** Hearing: August 26, 2008 Time: 8:30 a.m. Judge: Hon. David G. Brown Dept.: 3

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 26, 2008, at 8:30 a.m., or as soon thereafter as counsel may be heard, in Department 3 of the above-entitled Court, located at 325 South Melrose, Vista, California, Defendants DC Shoes, Inc., Kenneth Block, Damon

Way, the Damon Way Revocable Trust U/A Dated May 20, 1999 and Brian Wright (collectively, "Defendants") will, and hereby do, move this Court for an order striking in its entirety Plaintiffs' untimely filed Motion for New Trial.

This Motion is made on the grounds that Plaintiffs' Motion for New Trial was untimely and, therefore, may not be considered by the Court, which lacks jurisdiction to entertain a late-filed Motion for New Trial. Judgment was entered by the Court on January 4, 2008. That same day Plaintiffs were served with notice of entry of the Judgment. California Code of Civil Procedure Section 659 provides that a motion for new trial must be filed within fifteen days of service of notice of judgment. Plaintiffs, however, waited nearly six months to file their Motion. Accordingly, Plaintiffs' Motion for New Trial should be stricken.

This Motion is based on this Notice of Motion and Motion to Strike, the Memorandum of Points and Authorities and Declaration of Molly J. Magnuson attached hereto, and on such other matters as may be presented to the Court at or before the hearing of this matter.

DATED: August 1, 2008

MICHAEL G. YODER
MOLLY J. MAGNUSON
DANIEL S. ROBINSON
O'MELVENY & MYERS LLP

By: [signature]
Molly J. Magnuson
Attorneys for Defendants
DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 and BRIAN WRIGHT

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT.

Plaintiffs Clayton D. Blehm ("Blehm"), the Clayton Blehm Living Trust and FDC Investments, Inc.'s (collectively, "Plaintiffs") Motion for New Trial should be stricken in its entirety. It should be stricken as untimely because it was not filed, as required, within fifteen days of service of notice of entry of judgment, as required by Section 659 of the California Code of Civil Procedure. Indeed, Plaintiffs waited nearly six months after service of the judgment to file their Motion.

Because the issue is jurisdictional, the Court does not have the discretion to consider a late-filed motion for new trial. "Timely filing is essential to the jurisdiction of the court to entertain a motion for a new trial." *Ehrler v. Ehrler*, 126 Cal. App. 3d 147, 151 (1981). Accordingly, Plaintiffs' untimely Motion for New Trial should be stricken.

II. PLAINTIFFS' LATE-FILED MOTION FOR NEW TRIAL SHOULD BE STRICKEN.

A party is required to file a motion for new trial at the *earliest* of: (1) 15 days after the clerk's mailing of notice of entry of judgment; (2) 15 days after service by a party of written notice of entry of judgment; or (3) the expiration of 180 days. *See* Cal. Code Civ. Proc. § 659. Judgment in this action was entered by the Court on January 4, 2008. (Declaration of Molly J. Magnuson in Support of Motion to Strike Motion for New Trial ("Magnuson Decl.") Ex. 1.) Plaintiffs received notice of the entry of judgment that same day, on January 4, 2008. (*Id.* Ex. 2.) Plaintiffs were thus required, under Section 659, to move for a new trial by January 21, 2008.[1] Nonetheless, Plaintiffs waited until July 2, 2008 – five and half months later – to file their notice of intent to move for a new trial.

---

[1] Because fifteen days fell on January 19, 2008, a Saturday, Plaintiffs had until the following Monday, January 21, 2008, to file their Motion.

The Court lacks jurisdiction to consider a late-filed motion for new trial. "Timely filing is essential to the jurisdiction of the court to entertain a motion for a new trial." *Ehrler,* 126 Cal. App. 3d at 151. "The trial court does not have the jurisdiction to make an order granting a new trial on its own motion. The power to grant a new trial may be exercised only through statutorily authorized procedure." *Id.; see also Marriage of Beilock*, 81 Cal. App. 3d 713, 721, (1978) ("It is well settled that a timely filing of the notice of intention to move for new trial is jurisdictional, and the time cannot be extended or waived by the parties."). Accordingly, Plaintiffs' Motion should be stricken as untimely.

III. CONCLUSION.

For the reasons set for the above, Defendants' respectfully request that the Court strike Plaintiffs' untimely filed Motion for New Trial.

DATED: August 1, 2008

MICHAEL G. YODER
MOLLY J. MAGNUSON
DANIEL S. ROBINSON
O'MELVENY & MYERS LLP

By: [signature]
Molly J. Magnuson
Attorneys for Defendants
DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 and BRIAN WRIGHT

DECLARATION OF MOLLY J. MAGNUSON

I, Molly J. Magnuson, declare as follows:

1. I am an attorney duly admitted and licensed to practice law before the courts of the State of California. I am an associate at the law firm of O'Melveny & Myers LLP, and am one of the attorneys with primary responsibility for representing defendants Defendants DC Shoes, Inc. ("DC Shoes"), Kenneth Block, Damon Way, the Damon Way Revocable Trust U/A Date May 20, 1999 and Brian Wright (collectively, "Defendants") in this action. I have personal knowledge of the facts stated below and if called to testify, I could and would testify competently hereto.

2. Judgment was entered by the Court on January 4, 2008. A true and correct copy of the Judgment is attached hereto as Exhibit 1.

3. On or about July 29, 2008, Plaintiffs filed with the California Court of Appeal and served on Defendants a Civil Case Information Statement. A true and correct copy of Plaintiffs' Civil Case Information Statement is attached hereto as Exhibit 2. At Section B.2 on the first page of the Civil Case Information Statement, Plaintiffs state that they were served with a copy of the Judgment on January 4, 2008.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on the 1st day of August, 2008, at Newport Beach, California.

[signature]

Molly J. Magnuson

Exhibit 1

FILED
Clerk of the Superior Court
JAN 0 4 2008

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation, Plaintiffs, v. DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT, an individual; and DOES 1 through 25, inclusive, Defendants.	Case No. GIN 054897 [[redacted]] JUDGMENT AFTER JURY TRIAL Judge: David G. Brown Dept.: 25

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NORTH COUNTY DIVISION SAN DIEGO SUPERIOR COURT

NB1:733714.2

This action came on regularly for trial on October 18, 2007, in Department 25 of the above-referenced Court, the Honorable David G. Brown, presiding. On October 29, 2007, the Court impaneled and swore a jury of 12 persons, and two alternate jurors, who over the course of the next six weeks, heard the testimony of approximately 13 duly sworn witnesses. Plaintiffs were represented at trial by Lawrence G. Campitiello of McColloch & Campitiello, LLP; defendants were represented at trial by Michael G. Yoder and Molly J. Magnuson of O'Melveny & Myers LLP.

At the close of plaintiffs' case, the Court granted in part defendants' motion for nonsuit pursuant to California Code of Civil Procedure Section 581c(a), ordering as follows: (1) that judgment be entered in favor of defendant Brian Wright on plaintiffs' second cause of action for intentional concealment; (2) that judgment be entered in favor of defendants Kenneth Block, Damon Way and the Damon Way Revocable Trust U/A dated May 20, 1999 (the "Way Trust") on plaintiffs' sixth cause of action for breach of contract; and (3) that, as a matter of law, plaintiffs were not entitled to punitive damages from Block, Way or the Way Trust.

At the conclusion of all evidence, the Court granted in part defendants' motion for a directed verdict pursuant to California Code of Civil Procedure Section 630(a), ordering as follows: (1) that judgment be entered in favor of Block, Way and the Way Trust on plaintiffs' second cause of action for intentional concealment; and (2) that, as a matter of law, plaintiffs were not entitled to punitive damages from defendant DC Shoes, Inc. ("DC Shoes").

After the conclusion of all evidence and arguments of counsel, the Court duly instructed the jury on the remaining causes of action against DC Shoes and directed the jury to return a special verdict as to such causes of action; whereupon the jury retired, deliberated and on December 4, 2007 announced its verdict in favor of defendant DC Shoes and against plaintiffs Clayton D. Blehm, the Clayton Blehm Living Trust 1997 and FDC Investments, Inc. on all causes of action submitted to it as follows:

"SPECIAL VERDICT FORM

We answer the questions submitted to us as follows:

I. BREACH OF CONTRACT

1. Was there a written Settlement Agreement and Release between DC Shoes, Inc. ("DC Shoes"), on one side, and Clayton D. Blehm, on the other side?

X Yes ___ No

If your answer to question 1 is "yes," then answer question 2. If your answer to question 1 is "no," stop here, answer no further questions in Section I, and go to Section II.

2. Did Mr. Blehm do all, or substantially all, of the significant things that the Settlement Agreement and Release required him to do?

X Yes ___ No

If your answer to question 2 is "yes," then answer question 3. If your answer to question 2 is "no," stop here, answer no further questions in Section I, and go to Section II.

3. Did DC Shoes fail to do something that it was required to do under the terms of the Settlement Agreement and Release?

___ Yes X No

If your answer to question 3 is "yes," then answer question 4. If your answer to question 3 is "no," stop here, answer no further questions in Section I, and go to Section II.

4. Was Mr. Blehm harmed by DC Shoes' failure?

___ Yes ___ No

If your answer to question 4 is "yes," then answer question 5. If your answer to question 4 is "no," stop here, answer no further questions in Section I, and go to Section II.

5. What is the amount of Mr. Blehm's damages, if any?

$___________________

Proceed to Section II.

II. INTENTIONAL CONCEALMENT

1. Did DC Shoes intentionally fail to disclose an important fact that FDC Investments, Inc. ("FDC Investments") and Clayton D. Blehm ("Plaintiffs") could not

have discovered in connection with DC Shoes' purchase of FDC Investments' stock in DC Shoes?

___Yes _X_ No

If you answered "yes" to question 1, then answer question 2. If you answered "no" to question 1, stop here, answer no further questions in this Section II, and have the presiding juror sign and date this form.

2. Was the fact DC Shoes failed to disclose known only to DC Shoes?

___Yes ___No

If you answered "yes" to question 2, then answer question 3. If you answered "no" to question 2, stop here, answer no further questions in this Section II, and have the presiding juror sign and date this form.

3. Did DC Shoes intend to deceive Plaintiffs by concealing the fact?

___Yes ___No

If you answered "yes" question 3, then answer question 4. If you answered "no" to question 3, stop here, answer no further questions in this Section II, and have the presiding juror sign and date this form.

4. Did Plaintiffs reasonably rely on the concealment?

___Yes ___No

If you answered "yes" to question 4, then answer question 5. If you answered "no" to question 4, stop here, answer no further questions in Section II, and have the presiding juror sign and date this form.

5. Were Plaintiffs harmed by the concealment?

___Yes ___No

If you answered "yes" to question 5, then answer question 6. If you answered "no" to question 5, stop here, answer no further questions in Section II, and have the presiding juror sign and date this form.

6. Was the concealment by DC Shoes a substantial factor in causing harm to Plaintiffs?

___Yes ___No

If you answered "yes" to question 6, then answer question 7. If you answered "no" to question 6, stop here, answer no further questions in Section II, and have the presiding juror sign and date this form.

7. What are Plaintiffs' damages, if any?

$___________________

If you answered question 7 with a damages amount greater than zero, then answer question 8. If you answered "zero" or "no damages" to question 7, stop here, answer no further questions in Section II, and have the presiding juror sign and date this form.

8. Did DC Shoes prove by clear and convincing evidence that Plaintiffs freely and knowingly accepted the benefits of the sale of FDC Investments' stock in DC Shoes despite their knowledge of facts forming the basis of their intentional concealment claim?

___Yes ___No"

The jury's findings on the questions answered were unanimous, except for its answer "no" in response to Question I-3, for which the vote was 11 to 1, and its answer "no" in response to Question II-1, for which the vote was 10 to 2.

After the jury's verdict was read, the Court issued its ruling in favor of all defendants and against plaintiffs on plaintiffs' first cause of action for breach of fiduciary duty, ordering that judgment be entered in favor of defendants on that claim.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

1. Plaintiffs CLAYTON D. BLEHM, THE CLAYTON BLEHM LIVING TRUST 1997 and FDC INVESTMENTS, INC., and each of them, take nothing by way of their Complaint against defendants DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 and BRIAN WRIGHT; and

2. Defendants DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE

DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 and BRIAN WRIGHT shall have and recover from plaintiffs CLAYTON D. BLEHM, THE CLAYTON BLEHM LIVING TRUST 1997 and FDC INVETMENTS, INC., and each of them, their costs of suit in the sum of $ pursuant to cost memo

DATE: Jan 4, 2008 DG

Hon. David G. Brown,
Judge of the Superior Court

FILED
Clerk of the Superior Court
JAN 04 2008

PROOF OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 610 Newport Center Drive, 17th Floor, Newport Beach, California 92660-6429. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence collected from me would be processed on the same day, with postage thereon fully prepaid and placed for deposit that day with the United States Postal Service. On December 14, 2007 I served the following:

[~~PROPOSED~~] JUDGMENT AFTER JURY TRIAL

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

Lawrence G. Campitiello, Esq.
McColloch & Campitiello, LLP
5900 La Place Court, Suite 100
Carlsbad, CA 92008-8832

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 14, 2007, at Newport Beach, California.

Linda Evington
Linda Evington

Exhibit 2

TO BE FILED IN THE COURT OF APPEAL

APP-004

CIVIL CASE INFORMATION STATEMENT COURT OF APPEAL, California APPELLATE DISTRICT, DIVISION 4	Court of Appeal Case Number (if known): D053399
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Law Office of Roy R. Withers, Esq. Roy R. Withers, Esq. (State Bar No. 120779) 2802 Juan Street; Suite 12 San Diego, CA 92110 TELEPHONE NO.: 619-295-1305 FAX NO. (Optional): 619-297-9036 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Clayton Blehm, et al.	FOR COURT USE ONLY O'MELVENY & MYERS CALENDAR 193986-2 JUL 31 2008 CAL NLS DKT ATTYS MRY MJM DSR
APPELLANT: Clayton Blehm, et al. RESPONDENT: DC Shoes, Inc., et al.	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 325 South Melrose Drive MAILING ADDRESS: CITY AND ZIP CODE: Vista, CA 92083 BRANCH NAME: North County Division	
JUDGES (all who participated in case): David G. Brown	Superior Court Case Number: GIN 054897

NOTE TO APPELLANT: You must file this form with the clerk of the Court of Appeal within 10 days after the clerk mails you a notice that this form must be filed. You must attach to this form (1) a copy of the judgment or order being appealed that shows the date it was entered (see Cal. Rules of Court, rule 8.104 for definition of "entered") and (2) proof of service of this form on all parties to the appeal. (CAUTION: An appeal in a limited civil case (Code Civ. Proc., § 85) may be taken ONLY to the appellate division of the superior court (Code Civ. Proc., § 904.2), or to the superior court (Code. Civ. Proc., § 116.710 [small claims cases]).

PART I – APPEAL INFORMATION

A. APPEALABILITY

1. Appeal is from:
   - [x] Judgment after jury trial
   - [ ] Judgment after court trial
   - [ ] Default judgment
   - [ ] Judgment after an order granting a summary judgment motion
   - [ ] Judgment of dismissal under Code Civ. Proc., §§ 581d, 583.250, 583.360, or 583.430
   - [ ] Judgment of dismissal after an order sustaining a demurrer
   - [ ] An order after judgment under Code Civ. Proc., § 904.1(a)(2)
   - [ ] An order or judgment under Code Civ. Proc., § 904.1(a)(3)–(13)
   - [ ] Other *(describe and specify code section that authorizes this appeal):*

2. Does the judgment appealed from dispose of all causes of action, including all cross-actions between the parties?
   [x] Yes [ ] No If no, please explain why the judgment is appealable:

B. TIMELINESS OF APPEAL *(Provide all applicable dates.)*

1. Date of entry of judgment or order appealed from: 01 / 04 / 08
2. Date that notice of entry of judgment or a copy of the judgment was mailed by the clerk or served by a party under California Rules of Court, rule 8.104: 01 / 04 / 08
3. Was a motion for new trial, judgment notwithstanding the verdict, reconsideration, or to vacate the judgment made and denied?
   [ ] Yes [x] No If yes, please specify the type of motion:

   Date motion filed: ___/___/___ Date denied: ___/___/___ Date denial served: ___/___/___
4. Date notice of [x] appeal or [ ] cross-appeal filed: 07 / 02 / 08

C. BANKRUPTCY OR OTHER STAY

Is there a related bankruptcy case or a court-ordered stay that affects this appeal? [ ] Yes [x] No *(If yes, please attach a copy of the bankruptcy petition [without attachments] and any stay order.)*

Form Adopted for Mandatory Use
Judicial Council of California
APP-004 [Rev. July 1, 2007]

CIVIL CASE INFORMATION STATEMENT
(Appellate)

American LegalNet, Inc.
www.FormsWorkflow.com

PROOF OF SERVICE
DATED 7-29-08

SERVED ON US BY MAIL
POSTMARKED 7-29-08

TO BE FILED IN THE COURT OF APPEAL

APP-004

CIVIL CASE INFORMATION STATEMENT

COURT OF APPEAL, California APPELLATE DISTRICT, DIVISION 4

Court of Appeal Case Number (if known): D053399

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Law Office of Roy R. Withers, Esq.
Roy R. Withers, Esq. (State Bar No. 120779)
2802 Juan Street; Suite 12
San Diego, CA 92110
TELEPHONE NO.: 619-295-1305 FAX NO. (Optional): 619-297-9036
E-MAIL ADDRESS (Optional):
ATTORNEY FOR (Name): Clayton Blehm, et al.

FOR COURT USE ONLY

APPELLANT: Clayton Blehm, et al.

RESPONDENT: DC Shoes, Inc., et al.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 325 South Melrose Drive
MAILING ADDRESS:
CITY AND ZIP CODE: Vista, CA 92083
BRANCH NAME: North County Division

JUDGES (all who participated in case):
David G. Brown

Superior Court Case Number: GIN 054897

NOTE TO APPELLANT: You must file this form with the clerk of the Court of Appeal within 10 days after the clerk mails you a notice that this form must be filed. You must attach to this form (1) a copy of the judgment or order being appealed that shows the date it was entered (see Cal. Rules of Court, rule 8.104 for definition of "entered") and (2) proof of service of this form on all parties to the appeal. (CAUTION: An appeal in a limited civil case (Code Civ. Proc., § 85) may be taken ONLY to the appellate division of the superior court (Code Civ. Proc., § 904.2), or to the superior court (Code. Civ. Proc., § 116.710 [small claims cases]).

PART I – APPEAL INFORMATION

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   - [✓] Judgment after jury trial
   - [ ] Judgment after court trial
   - [ ] Default judgment
   - [ ] Judgment after an order granting a summary judgment motion
   - [ ] Judgment of dismissal under Code Civ. Proc., §§ 581d, 583.250, 583.360, or 583.430
   - [ ] Judgment of dismissal after an order sustaining a demurrer
   - [ ] An order after judgment under Code Civ. Proc., § 904.1(a)(2)
   - [ ] An order or judgment under Code Civ. Proc., § 904.1(a)(3)–(13)
   - [ ] Other *(describe and specify code section that authorizes this appeal):*

2. Does the judgment appealed from dispose of all causes of action, including all cross-actions between the parties?
   [✓] Yes [ ] No If no, please explain why the judgment is appealable:

B. TIMELINESS OF APPEAL *(Provide all applicable dates.)*

1. Date of entry of judgment or order appealed from: 01 / 04 / 08
2. Date that notice of entry of judgment or a copy of the judgment was mailed by the clerk or served by a party under California Rules of Court, rule 8.104: 01 / 04 / 08
3. Was a motion for new trial, judgment notwithstanding the verdict, reconsideration, or to vacate the judgment made and denied?
   [ ] Yes [✓] No If yes, please specify the type of motion:

   Date motion filed: ___/___/___ Date denied: ___/___/___ Date denial served: ___/___/___
4. Date notice of [✓] appeal or [ ] cross-appeal filed: 07 / 02 / 08

C. BANKRUPTCY OR OTHER STAY

Is there a related bankruptcy case or a court-ordered stay that affects this appeal? [ ] Yes [✓] No *(If yes, please attach a copy of the bankruptcy petition [without attachments] and any stay order.)*

APP-004

APPELLATE CASE TITLE:	SUPERIOR COURT CASE NUMBER:
BLEHM vs. DC SHOES, et. al	GIN 054897

D. APPELLATE CASE HISTORY *(Provide additional information, if necessary, on attachment I.D.)*

Is there now, or has there previously been, any appeal, writ, or other proceeding related to this case pending in any California appellate court? ☐ Yes ☑ No If yes, insert name of appellate court:

Appellate court case no.: Title of case:

Name of trial court: Trial court case no.:

E. SERVICE REQUIREMENTS

Is service of documents in this matter, including a brief or a petition, required on the Attorney General or other nonparty public officer or agency under California Rules of Court, rule 8.29 or a statute? Yes ☐ No ☑ *If yes, please indicate the rule or statute that applies.*

☐ Rule 8.29
☐ Bus. & Prof. Code, § 17209 (Unfair Competition Act)
☐ Bus. & Prof. Code, § 17536.5 (False advertising)
☐ Civ. Code, § 51.1 (Unruh, Ralph, or Bane Civil Rights Acts; antiboycott causes of action; sexual harassment in business or professional relations; civil rights action by district attorney)
☐ Civ. Code, § 55.2 (Disabled access to public conveyances, accommodations, and housing)
☐ Gov. Code, § 4461 (Disabled access to public buildings)
☐ Gov. Code, § 12656(a) (False Claims Act)
☐ Health & Saf. Code, § 19954.5 (Accessible seating and accommodations)
☐ Health & Saf. Code, § 19959.5 (Disabled access to privately funded public accommodations)
☐ Other *(please specify statute):*

NOTE: The rule and statutory provisions listed above require service of a copy of a party's brief or petition and brief on the Attorney General or other public officer or agency. Other statutes requiring service on the Attorney General or other public officers or agencies may also apply. (See, e.g., Code Civ. Proc., § 1355; Gov. Code, § 946.6(d); Pub. Resources Code, § 21167.7.)

PART II – NATURE OF ACTION

A. Nature of action *(check all that apply):*

1. ☐ Conservatorship
2. ☑ Contract
3. ☐ Eminent domain
4. ☐ Equitable action a. ☐ Declaratory relief b. ☐ Other *(describe):*
5. ☐ Family law
6. ☐ Guardianship
7. ☐ Probate
8. ☐ Real property rights a. ☐ Title of real property b. ☐ Other *(describe):*
9. ☑ Tort
   a. ☐ Medical malpractice b. ☐ Product liability
   c. ☐ Other personal injury d. ☐ Personal property
   e. ☑ Other tort *(describe):* Fraud
10. ☐ Trust proceedings
11. ☐ Writ proceedings in superior court
    a. ☐ Mandate (Code Civ. Proc., § 1085) b. ☐ Administrative mandate (Code Civ. Proc., § 1094.5)
    c. ☐ Prohibition (Code Civ. Proc., § 1102) d. ☐ Other *(describe):*
12. ☑ Other action *(describe):* Fraud

B. ☐ This appeal is entitled to calendar preference/priority on appeal *(cite authority):*

PART III – PARTY AND ATTORNEY INFORMATION

Please attach to this form a list of all the parties and all their attorneys of record who will participate in the appeal. For the parties, include the following information: the party's name and his or her designation in the trial court proceeding (plaintiff, defendant, etc.). For the attorneys, include the following information: name, State Bar number, mailing address, telephone number, fax number, and e-mail address.

Date: 7/14/08

This statement is prepared and submitted by: ▶ [signature]

(SIGNATURE OF ATTORNEY OR UNREPRESENTED PARTY)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation; Plaintiffs, vs. DC SHOES, INC., et. al., Defendants.	Case No. GIN054897 ORDER AFTER HEARING ON PLAINTIFF'S MOTION TO TAX COSTS AND DEFENDANT'S MOTION FOR ATTORNEYS' FEES

I. PROCEDURAL HISTORY

Judgment in this matter issued on January 4, 2008. A jury found for the defendant on the causes of action for breach of contract and intentional concealment. Costs were awarded to the defendants pursuant to a duly filed costs memorandum. (*Judgment filed January 4, 2008.*)

DC Shoes filed its memorandum of costs on January 22, 2008, requesting total costs of $64,339.50. [Memorandum of Costs filed January 22, 2008.] BLEHM filed a timely motion to tax these costs. DC Shoes filed a separate motion for attorneys' fees requesting fees in the amount of $1,172,718. [Motion for Attorneys' Fees filed January 22, 2008.]

BLEHM filed an opposition to the motion for attorneys' fees. DC Shoes filed opposition to the motion to tax costs. Appropriate and timely replies were filed to both oppositions.

This matter began in the United States District Court with BLEHM filing a July 14, 2005 complaint. That action was voluntarily dismissed by BLEHM on April 20, 2006. The state court action was initiated on August 17, 2006.

II. DEFENDANT DC SHOES IS THE PREVAILING PARTY

"'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (CCP § 1032 (a) (4).)

III. MOTION TO TAX COSTS

The award of costs is statutory. CCP § 1033.5(a) identifies those costs which are allowable and § 1033.5(b) identifies those which are not. Subsection (c) (4) allows the court, in its discretion, to allow or deny costs not otherwise mentioned in subsections (a) or (b). All costs must be "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (CCP §1033.5(c) (2).)

Costs recoverable under CCP § 1032 are restricted to those that are both (1) reasonable in amount and (2) reasonably necessary to the conduct of the litigation. (CCP § 1033.5(c) (2) & (3).)

//

Costs "merely convenient or beneficial to its preparation" are disallowed. (CCP § 1033.5(c) (2); *Nelson v. Anderson* (1999) 72 Cal. App. 4th 111, 129; *Ladas v. California State Auto. Association* (1993) 19 Cal. App. 4th 761, 774.)

The court has power to disallow even costs "allowable as a matter of right" if they were not "reasonably necessary," and to reduce the amount of any cost item to that which is "reasonable." (*Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal. App. 4th 238, 245.)

BLEHM moved to tax costs in the following three areas:

A. FILING AND MOTION FEES OF $1,820

BLEHM moved to strike $40.00 for a motion to strike in this matter and $180.00 for a motion to dismiss brought in U.S. District Court.

DC SHOES argues that this cost is allowable despite the fact the motion was denied and that costs incurred in relation to the district court motion should be awarded as the work done in that case was ultimately useful in this matter.

DC SHOES is correct regarding the first argument but incorrect as to the second. Accordingly, they are awarded the $40.00 filing fee for their unsuccessful state court motion. However, their request for costs incurred in the district court is inappropriate and therefore disallowed as they are only award costs based on their status as the prevailing party in *this* matter.

Based on the above, these costs are taxed by $180.00 for an award of $1,640.

//

//

//

B. EXPERT WITNESS FEES OF $20,825

BLEHM seeks to tax these costs by $8,575, arguing that pursuant to the Local Rules of Court, rule 2.1.11, $250 per hour is the customary rate paid an attorney acting as an expert witness. (Local Rules of Court, rule 2.1.11.)

DC SHOES argues that the $425.00 charged by its expert was reasonable based on his level of expertise. By definition, all "experts" are highly qualified and deserving of reasonable fees. This court has established a guideline from which a departure is not warranted. Accordingly, these costs will be taxed by $8,575 for an award of $12,250.

C. TRIAL EXHIBIT COSTS OF $14,845.42

BLEHM moves to tax the cost of the trial presentation equipment and questions whether credit was given for sums paid to DC SHOES for these costs. Because DC SHOES failed to itemize these costs, the court cannot determine what was actually paid for each subcategory claimed.

DC SHOES argues it is entitled to $600.00 in rental equipment because they are allowable under CCP § 1033.5 (a) (12) and because the attorney's fees provision contracted to by the parties references "costs." DC SHOES does not address the issue whether an offset was given for sums BLEHM already paid.

CCP § 1033.5 (a) (12) states "[m]odels and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact." Rental equipment used to display exhibits is a recoverable cost item. (*Ripley v. Pappadopoulos* (1994) 23 Cal. App. 4th 1616, 1623.) Accordingly, these costs will not be taxed.

D. COST AWARD

Based on the above, DC SHOES total costs will be taxed $8,755, for a total cost award of $55,584.53.

//

IV. MOTION FOR ATTORNEYS' FEES

In an action to enforce a contract authorizing an award of attorney's fees, the party "prevailing on the contract" is entitled to reasonable attorney's fees. (*Civic. § 1717.*) Such fee awards are allowable as court costs pursuant to CCP § 1032. *(CCP § 1032.)*

In determining "prevailing party" status, we look to the party who recovered greater relief in the action on the contract. (*Civ.C. § 1717(b) (1).*) When a party obtains a simple, unqualified victory, as did DC SHOES, by completely prevailing on or defeating, all contract claims and the contract provides for attorney fees, Civil Code § 1717 entitles that party to recover reasonable attorney fees as *a matter of law*. (*Civil Code § 1717; Scott Co. of Calif. v. Blount, Inc.* (1999) 20 Cal. 4th 1103, 1109; *Hsu v. Abbara* (1995) 9 Cal. 4th 863, 865.) As discussed in section II above, DC SHOES is the prevailing party.

Additionally, if a cause of action has been voluntarily dismissed, or dismissed pursuant to settlement, there is no prevailing party for purposes of awarding Civil Code § 1717 fees under the contract. (Civ.C. § 1717(b) (2); *Santisas v. Goodin* (1998) 17 Cal. 4th 599, 617; *Pacific Custom Pools, Inc. v. Turner Const. Co.* (2000) 79 Cal. App. 4th 1254, 1267.)

The settlement agreement entered into by the parties on August 20, 2003, contains the following attorney's fees provision:

> 15.6 Attorney's Fees. Should suit be brought to enforce or interpret any part of this Agreement, the prevailing party will be entitled to recover, as an

> element of the costs of suit and not as damages, reasonable attorney's fees to be fixed by the court (including, without limitation, costs, expenses and fees on any appeal.)

The Securities Purchase Agreement entered into between the parties also on August 20, 2003, contains the following attorney's fees provision:

> 11.6 Attorney's Fees. If any legal action or other proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the successful or prevailing party shall be entitled to recover reasonable attorneys fees and other costs incurred in that action or proceeding in an addition to any other relief to which it may be entitled.

DC SHOES seek $1,172,718 in attorney's fees. They claim fees under both the settlement agreement and the securities purchase agreement. This court finds that fees are recovered only under the settlement agreement, this being the sole agreement at issue during trial.

DC SHOES state the current action had seven distinct phases: 1) work related to the United States District Court action [$71,215.50]; 2) work related to pleadings in the state court action [$28,510]; 3) work related to discovery in the state court action [$322,484]; 4) work related to mediation in the state court action [$18,999.50]; 5) work related to preparation for trial in the state court action [$332,181.50]; 6) trial in the state court action [$397.562]; and, 7). post-trial work in the state court action [$1,805].

DC SHOES argues the attorneys' fees provision in the settlement agreement is broad enough to allow recovery not only on BLEHMS' breach of contract claim but the claims for fraud and breach of fiduciary duty. They argue the attorneys' fees provision in the stock purchase agreement also allows for such recovery. However, as discussed, this court specifically holds only the settlement agreement provisions to be controlling.

BLEHM concedes that DC SHOES prevailed but makes the following arguments: 1) any fees incurred in prior District Court action are not recoverable; 2) fees incurred in connection with tort causes of action are not recoverable; 3) the hourly rate charged is excessive; and, 4) the hours spent are duplicative and excessive.

DC SHOES made no showing that the fees incurred in defending the District Court action significantly assisted in defending the state court action. The District Court declined to award attorney's fees following BLEHMS' voluntary dismissal of the federal action stating "although defendants have presented evidence that demonstrates some of the work completed in this case may not be used in later state court proceeding, this Court is not persuaded by defendant's explanation of why such a substantial portion of the work completed in defending the instant case is clearly unusable in state court." Simply because the District Court ruled that "not all work" in the federal action was wasted, it does not necessarily follow that all work expended in the District Court action assisted DC SHOES in the current action. This aspect of the attorney's fees request is denied as DC SHOES failed to show the relevance of these legal services to the state court action.

Second, where non-contract claims (e.g., tort claims) are joined in "an action on a contract," the court's power to award fees on the non-contract claims depends on the wording of the attorney fee clause. When a contractual attorney's fees provision is narrowly worded, covering only actions "on the contract" or "to enforce the contract," there can be no recovery for services on other claims and fees must be apportioned to reflect counsel's services at trial on the separate contract versus non-contract claims.

(*Reynolds Metals Co. v. Alperson* (1979) 25 Cal. 3d 124, 129; *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal. App. 4th 698, 708–709.)

Even when a contractual attorneys' fees provision is narrowly worded, fees need not be apportioned if counsel's services relate to an issue common to both the contract and non-contract claims. (*Wilshire Westwood Association v. Atlantic Richfield Co.* (1993) 20 Cal. App. 4th 732, 747; *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal. App. 4th 1073, 1083.) If, however, the award of attorneys' fees is based upon a broadly worded fee provision, recovery for such fees is not limited to contract causes of action, but to tort claims "arising out of," the contract. (*Santisas v. Goodin* (1998) 17 Cal. 4th 599, 608; *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal. App. 4th 1063, 1071–1072; *Moallem v. Coldwell Banker Commercial Group, Inc.* (1994) 25 Cal. App. 4th 1827, 1831; *Thompson v. Miller* (2003) 112 Cal. App. 4th 327, 336.)

Here, whether or not DC SHOES may recover for both tort-based and contract-based causes of action depends on which attorney fee provision applies. As previously stated, this court finds that the attorney fee provision contained in the settlement agreement controls. That provision is narrowly-worded and does not encompass tort-based causes of action. Accordingly, the court finds it inappropriate to award attorney's fees incurred in connection with non-contract causes of action.

Third, the court finds that the hourly rate requested by DC SHOES is excessive. The statement is made without any inference as to the quality of legal services rendered by all counsel involved, which was uniformly excellent at all levels.

Fourth, the court finds BLEHM's argument regarding duplication of effort to be meritorious and therefore reduces the award accordingly.

Based on the above, total attorneys' fees are awarded in the amount of $234,962.

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V. AWARD

For the reasons stated above, DC SHOES is awarded $234,962 in total attorneys' fees, as reasonable, plus an additional $55,584.53 in costs.

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IT IS SO ORDERED.

Dated: 5/8/08

DAVID G. BROWN
Judge of the Superior Court

APPELLATE CASE TITLE:	**SUPERIOR COURT CASE NUMBER:**
BLEHM vs. DC SHOES, et al.	GIN 054897

PART III - PARTY AND ATTORNEY INFORMATION:

PLAINTIFFS: CLAYTON D. BLEHM; CLAYTON BLEHM LIVING TRUST; FDC INVESTMENTS INC.

ATTORNEY: ROY R. WITHERS, ESQ. (STATE BAR NO. 120779)
2802 JUAN STREET; SUITE 12
SAN DIEGO, CA 92110
PH: 619-295-1305
FX: 619-297-9036

DEFENDANTS: DC SHOES, INC.; KENNETH BLOCK; DAMON WAY; THE DAMON WAY REVOCABLE TRUST; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT; DOES 1-25

ATTORNEY: MICHAEL YODER, ESQ. (STATE BAR NO. 83059)
MOLLY MAGNUSON (STATE BAR NO. 229444)
O'MELVENY & MEYERS LLP
610 NEWPORT CENTER DR., 17th FLOOR
NEWPORT BEACH, CA 92660-6429
PH: 949-760-9600
FX: 949-823-6994

POS-030

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Law Office of Roy R. Withers, Esq. Roy R. Withers, Esq. (State Bar No. 120779) 2802 Juan Street; Suite 12 San Diego, CA 92110 TELEPHONE NO.: 619-295-1305 FAX NO. (Optional): 619-297-9036 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Clayton Blehm, et al.	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: 750 B Street, Suite 300 CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: COURT OF APPEAL Fourth Appelate Dist. - Division 1	
PETITIONER/PLAINTIFF: Clayton Blehm, et al. RESPONDENT/DEFENDANT: DC Shoes, Inc., et al.	
PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL	CASE NUMBER: GIN 054897 / D053399

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. I am over 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place.

2. My residence or business address is:
   2802 Juan Street; Suite 12, San Diego, CA 92110

3. On *(date)*: 7/29/08 I mailed from *(city and state)*: San Diego, CA
   the following documents *(specify)*:
   CIVIL CASE INFORMATION STATEMENT

   ☐ The documents are listed in the *Attachment to Proof of Service by First-Class Mail—Civil (Documents Served)* (form POS-030(D)).

4. I served the documents by enclosing them in an envelope and *(check one)*:
   a. ☐ **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid.
   b. ☑ **placing** the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

5. The envelope was addressed and mailed as follows:
   a. **Name** of person served: Michael Yoder & Molly Magnuson
   b. **Address** of person served:
      O'MELVENY & MEYERS LLP
      610 Newport Center Dr., 17th Floor
      Newport Beach, CA 92660-6429

   ☐ The name and address of each person to whom I mailed the documents is listed in the *Attachment to Proof of Service by First-Class Mail—Civil (Persons Served)* (POS-030(P)).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

MEGAN WECKESSER
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

[signature]
(SIGNATURE OF PERSON COMPLETING THIS FORM)

American LegalNet, Inc.
www.USCourtForms.com

INFORMATION SHEET FOR PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL

(This information sheet is not part of the Proof of Service and does not need to be copied, served, or filed.)

NOTE: This form should **not** be used for proof of service of a summons and complaint. For that purpose, use *Proof of Service of Summons* (form POS-010).

Use these instructions to complete the *Proof of Service by First-Class Mail—Civil* (form POS-030).

A person over 18 years of age must serve the documents. There are two main ways to serve documents: (1) by personal delivery and (2) by mail. Certain documents must be personally served. You must determine whether personal service is required for a document. Use the *Proof of Personal Service–Civil* (form POS-020) if the documents were personally served.

The person who served the documents by mail must complete a proof of service form for the documents served. **You cannot serve documents if you are a party to the action.**

INSTRUCTIONS FOR THE PERSON WHO SERVED THE DOCUMENTS

The proof of service should be printed or typed. If you have Internet access, a fillable version of the Proof of Service form is available at *www.courtinfo.ca.gov/forms.*

Complete the top section of the proof of service form as follows:

First box, left side: In this box print the name, address, and telephone number of the person *for* whom you served the documents.

Second box, left side: Print the name of the county in which the legal action is filed and the court's address in this box. The address for the court should be the same as on the documents that you served.

Third box, left side: Print the names of the Petitioner/Plaintiff and Respondent/Defendant in this box. Use the same names as are on the documents that you served.

First box, top of form, right side: Leave this box blank for the court's use.

Second box, right side: Print the case number in this box. The case number should be the same as the case number on the documents that you served.

Complete items 1–5 as follows:

1. You are stating that you are over the age of 18 and that you are not a party to this action. You are also stating that you either live in or are employed in the county where the mailing took place.
2. Print your home or business address.
3. Provide the date and place of the mailing and list the name of each document that you mailed. If you need more space to list the documents, check the box in item 3, complete the *Attachment to Proof of Service by First-Class Mail—Civil (Documents Served)* (form POS-030(D)), and attach it to form POS-030.
4. For item 4:

   Check box a if you personally put the documents in the regular U.S. mail.
   Check box b if you put the documents in the mail at your place of business.
5. Provide the name and address of each person to whom you mailed the documents. If you mailed the documents to more than one person, check the box in item 5, complete the *Attachment to Proof of Service by First-Class Mail—Civil (Persons Served)* (form POS-030(P)), and attach it to form POS-030.

At the bottom, fill in the date on which you signed the form, print your name, and sign the form. By signing, you are stating under penalty of perjury that all the information you have provided on form POS-030 is true and correct.

PROOF OF PERSONAL SERVICE

I am a citizen of the United States and employed in the County of Orange, State of California, at the law firm of O'Melveny & Myers, located at 610 Newport Center Drive, CA 92660. I am not a party to this action.

On August 1, 2008 I caused the personal service of the following document(s):

DEFENDANTS' NOTICE OF MOTION AND MOTION TO STRIKE PLAINTIFFS' UNTIMELY FILED MOTION FOR NEW TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF MOLLY J. MAGNUSON

by requesting that an agent or employee of First Legal Support Services deliver to the office of the recipient named below, either by handing the document(s) to the recipient or by leaving the document(s) with the receptionist or other person apparently in charge of the recipient's office:

Roy R. Withers, Esq.
Law Office of Roy R. Withers
2802 Juan Street, Suite 12
San Diego, CA 92110

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 1, 2008, at Newport Beach, California.

SIGNATURE: [signature]

PRINTED NAME: Adonna Payne

Exhibit 14

fMICHAEL G. YODER (S.B. #83059)
MOLLY J. MAGNUSON (S.B. #229444)
DANIEL S. ROBINSON (S.B. #244245)
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Attorneys for Defendants
DC SHOES, INC., KENNETH BLOCK,
DAMON WAY, THE DAMON WAY
REVOCABLE TRUST U/A DATED MAY 20,
1999 and BRIAN WRIGHT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

CLAYTON D. BLEHM, an individual; CLAYTON BLEHM LIVING TRUST 1997; and FDC INVESTMENTS, INC., a California corporation, Plaintiffs, v. DC SHOES, INC., a California corporation; KENNETH BLOCK, an individual; DAMON WAY, an individual; THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999; DC SHOES EMPLOYEE SHARE TRUST; BRIAN WRIGHT, an individual; and DOES 1 through 25, inclusive, Defendants.	Case No. GIN 054897 **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR NEW TRIAL** Judge: Hon. David G. Brown Dept.: 3 [Declaration of Molly J. Magnuson; Objections to the Declaration of Clayton D. Blehm; and Motion to Strike Untimely Motion for New Trial and Declaration in Support filed concurrently herewith]

I. INTRODUCTION.

Plaintiffs Clayton D. Blehm ("Blehm"), the Clayton Blehm Living Trust and FDC Investments, Inc. (collectively, "Plaintiffs") had their day in court. After over two and a half years of litigation and pre-trial discovery, a five-week jury trial was held, during which Plaintiffs had a full and fair opportunity to present to the Court and jury all of their evidence. Despite having every opportunity to present their case against Defendants DC Shoes, Inc. ("DC Shoes"), Kenneth Block, Damon Way, the Damon Way Revocable Trust U/A Date May 20, 1999 and Brian Wright (collectively, "Defendants"), Plaintiffs' claims were rejected in their entirety, resulting in a jury verdict finding in favor of Defendants on Plaintiffs' fraud and breach of contract claims and this Court's order in favor of Defendants on Plaintiffs' breach of fiduciary duty claim. Judgment was entered by the Court on January 4, 2008.

Plaintiffs now seek a new trial on all of their claims on three separate bases, none of which are supported by the record, the law or good sense. But, first and foremost, Plaintiffs' Motion is untimely. Though served with a copy of the Judgment on January 4, 2008, Plaintiffs waited nearly six months to file this Motion. Section 659 of the California Code of Civil Procedure, however, requires that a party move for a new trial within fifteen days of service of the judgment. And, because the matter is jurisdictional, the Court may not consider an untimely motion for new trial. *See Marriage of Beilock*, 81 Cal. App. 3d 713, 721, (1978) ("It is well settled that a timely filing of the notice of intention to move for new trial is jurisdictional, and the time cannot be extended or waived by the parties.").

Further, even if Plaintiffs' motion were timely, none of Plaintiffs' substantive legal arguments justify burdening Defendants or the Court with a new trial. Plaintiffs' first two asserted grounds, "new evidence" and "surprise," go hand in hand. Plaintiffs' claim with respect to both is that at trial it was discovered for the first time that Clancy Wilson, DC Shoes' tax counsel, had exchanged a draft stipulation with the IRS on August 14, 2003 – just days before Plaintiffs signed the Settlement Agreement with DC

Shoes – which, according to Plaintiffs, suggests that DC Shoes did not intend to pay Blehm's personal income taxes. However, as explained below, far from a "surprise" or "new evidence," this document had been produced to Plaintiff well before trial. Indeed, Plaintiffs had questioned Mr. Wilson about the issue at his deposition and proceeded to do the same at trial. There was nothing new or surprising about this document *at trial.*

Plaintiffs' alternative argument is that the Court inappropriately admitted into evidence Plaintiffs' amended tax returns. It was Plaintiffs, however, not Defendants, that moved these documents into evidence at trial. In any event, Plaintiffs' tax returns were highly relevant and there was no error in admitting them into evidence at trial.

As detailed below, not only is Plaintiffs' Motion fraught with inaccuracies, inconsistencies and blatant misrepresentations, it is legally unsupportable. Accordingly, Defendants' respectfully request that the Court deny Plaintiffs' Motion and let the Judgment stand.

II. PLAINTIFFS' MOTION FOR NEW TRIAL SHOULD BE DENIED AS UNTIMELY.[1]

A party is required to file a motion for new trial at the *earliest* of: (1) 15 days after the clerk's mailing of notice of entry of judgment; (2) 15 days after service by a party of written notice of entry of judgment; or (3) the expiration of 180 days. *See* Cal. Code Civ. Proc. § 659. Plaintiffs received notice of the entry of Judgment on January 4, 2008. (Declaration of Molly J. Magnuson ("Magnuson Decl.") Exs. 1, 2.) Nonetheless, Plaintiffs waited until July 2, 2008 – almost six months later – to file their notice of intent to move for a new trial.

The Court may not consider an untimely motion. "Timely filing is essential to the jurisdiction of the court to entertain a motion for a new trial." *Ehrler v. Ehrler*, 126 Cal. App. 3d 147, 151 (1981). "The trial court does not have the jurisdiction to make an order granting a new trial on its own motion. The power to grant a new trial may be

[1] Defendants have also concurrently moved to strike the entire Motion for New Trial as untimely.

exercised only through statutorily authorized procedure." *Id.; see also Marriage of Beilock*, 81 Cal. App. 3d at 721 ("It is well settled that a timely filing of the notice of intention to move for new trial is jurisdictional, and the time cannot be extended or waived by the parties."). As such, Plaintiffs' Motion should be denied outright as untimely.

III. PLAINTIFFS' ASSERTED GROUNDS FOR A NEW TRIAL ARE SUBSTANTIVELY WITHOUT MERIT.

A. There Was No Surprise at Trial Nor Any New Evidence Discovered.

In order to obtain a new trial on the ground of newly discovered evidence, a plaintiff must establish that: (1) the evidence is newly discovered; (2) reasonable diligence was exercised in its discovery and production; and (3) the evidence is material to the plaintiff's case. *In Re Marriage of Liu*, 197 Cal. App. 3d 143, 153 (1987); *White v. Dorfman*, 116 Cal. App. 3d 892, 899 (1981). A plaintiff seeking a new trial based on surprise must establish that there was a surprise at trial "which ordinary prudence could not have guarded against." Cal. Code Civ. Proc. § 657.3. Both grounds for new trial are looked on "with suspicion" and are "seldom successful" because of their stringent requirements. *See, e.g., Fletcher v. Pierceall*, 146 Cal. App. 2d 859, 866, (1956). Further, a party "surprised" by developments during trial should seek a continuance or move for a mistrial or other relief during the trial. Failure to do so may be held to be a waiver any right to a new trial on this ground. *Kauffman v. DeMutiis*, 31 Cal. 2d 429, 432 (1948).

The "new evidence" purportedly "discovered" by Plaintiffs is the fact that Clancy Wilson, DC Shoes' tax counsel, "submitted a final settlement document to the IRS on August 14, 2003, six days before the signing of the Settlement Agreement between Clayton Blehm and DC Shoes, Inc." (Motion at 2, *see also id.* at 5-6.) According to Plaintiffs, this newly discovered evidence "clearly showed that DC Shoes, Inc. would not be negotiating the payment of withholding taxes on the part of Clayton Blehm, the individual." (*Id.* (emphasis in original).) It is this same evidence that Plaintiffs claims to have been "surprised" by at trial. (*Id.*)

This "newly discovered" fact, however, was known by Plaintiffs well before the trial of this action. The "final settlement document" to which Plaintiffs point as new evidence was actually produced to Plaintiffs on February 20, 2007 – months before trial commenced. (*See* Magnuson Decl. ¶ 4, Ex. 3.) And, on September 9, 2008, Plaintiffs questioned Mr. Wilson about this document, and about whether an agreement had been reached with the IRS as of August 14, 2008, during Mr. Wilson's deposition:

> MR. CAMPITIELLO: For the record, Exhibit 122 is a three-page document, appears to be a pleading on the heading of United States Tax Court, with a Docket No. 11574-02. It has previously been marked for production purposes as WILSON (TAX CT) 00281 through 00283.
>
> Q. Do you recognize Exhibit 122, Mr. Wilson?
>
> A. No.
>
> Q. Does your signature appear on the last page of Exhibit 122?
>
> A. Yes.
>
> Q. And did you sign Exhibit 122 --
>
> A. Yes.
>
> Q. -- on August 14th, 2003?
>
> A. Yes.
>
> Q. Is Exhibit 122 a stipulated decision between DC Shoes and the Internal Revenue Service?
>
> ***
>
> A: I think by this time a general agreement had been reached with Mr. Anderson, but there were some minor formalities that kept -- that did not result in this document getting filed with the Court until sometime later. And then I think there was some other formalities that the government wanted to make

> some minor changes where it was reexecuted. But for purposes of a general understanding between Mr. Anderson and myself, I think it's safe to say that August 14, '03 is a time when things had come together regarding the amount of the taxes, the tax rates that were applicable.

(Magnuson Decl. Ex. 4 (Wilson Depo.) at 89:18-91:3).)

Thus, Plaintiffs were well aware of the August 14, 2003 draft decision document before trial. And Plaintiffs apparently believed that the document somehow supported their claims, as they included this document on their proposed trial exhibit list and then introduced it into evidence at trial during their direct examination of Mr. Wilson. Indeed, at trial, Plaintiffs' counsel specifically questioned Mr. Wilson about the draft decision document and his negotiation of that document with the IRS on behalf of DC Shoes. (*Id*. Ex. 5 (11/20/07 Trial Transcript) at 134:10-138:2).)

What Plaintiffs seem to be claiming is, not that they were surprised at trial, but that they were unaware, ***on August 20, 2003*** – at the time the parties entered into the Settlement Agreement – that DC Shoes and the IRS had already reached an alleged tentative agreement regarding DC Shoes' tax liability. This is evident from a review of Blehm's declaration in support of Plaintiffs' Motion, in which Blehm claims that it was a surprise to him that an agreement had been reached with the IRS on August 14, 2003; that Mr. Wilson had kept this a secret from him at the time; and that had he known about this at the time, he would not have signed the Settlement Agreement. (*See* Blehm Decl. ¶¶ 12-13, 17.) Blehm further states that "[t]his evidence was also newly discovered for the [same] reasons. It was unknown . . . Had I been [aware], I would have taken action before the sale to Quiksilver had been consummated [in May of 2004]." (*Id*. ¶ 18)

It seems that Plaintiffs severely misapprehend what type of "surprise," and what kind of "newly discovered evidence" must be shown to obtain a new trial. Simply put, the surprise must occur *at trial*, and the new evidence must be discovered *after trial*. or where new evidence is discovered *after trial*. A party is not entitled to a new trial on issues that were raised or could have been raised in the previous proceeding. And here, this issue was indeed raised. Plaintiffs alleged a fraud claim against Defendants in their Complaint on this very ground – namely, that Defendants had failed to disclose to Plaintiffs, at the time of the Settlement Agreement in August 2003, that an agreement had been reached with the IRS. In their Complaint, Plaintiffs' alleged as follows:

- Defendants affirmatively represented that Defendants would "pay all taxes, penalties and interest owing to the Internal Revenue Service relating to Blehm's prior employment with DC [Shoes]." (Magnuson Decl. Ex. 6 ¶ 37.)
- "[Defendants] knew the representation to be false, in that . . . at the time these representations were made, [Defendants] knew that they would enter into a settlement with the [IRS] pursuant to Internal Revenue Code § 3509, so that Blehm would remain responsible for paying the taxes, penalties, and interest relating to Blehm's prior employment with DC." (*Id.*)

Plaintiffs proceeded to vigorously litigate this claim throughout the course of their action against Defendants. In their response to Defendants' demurrer to the Complaint, for example, Plaintiffs made clear that this was one of the key issues in the case: "Plaintiffs were also induced to sell their shares of DC Shoes, Inc. to defendants based on defendants' promise to pay certain tax obligations on behalf of plaintiffs. However, unbeknownst to plaintiffs, the defendants were in the process of negotiating a deal with taxing authorities . . . ." (*Id.* Ex. 7, at 2.) Moreover, at Mr. Wilson's deposition, he was not simply questioned about the draft decision document between DC Shoes and the IRS, he was asked a litany of questions by Plaintiffs' counsel as to each of his communications with the IRS on behalf of DC Shoes, the timing of those communications and whether any of those communications were disclosed to Plaintiffs. This can be seen in just the limited excerpts quoted below from Mr. Wilson's deposition:

Q. Had you had conversations with Appeals Officer Anderson prior to this date, December 24th, 2002, about trying to resolve the Petition For Redetermination filed by DC Shoes?

A. Yes.

Q. Did you provide a copy of Exhibit 120 to Mr. Blehm at any time?

A. I don't -- it's not likely at this point that I would have been communicating directly with Mr. Blehm.

Q. Did you provide a copy of Exhibit 120 to Ms. Naughton or another representative of Mr. Blehm at any time?

A. I don't recall.

***

Q. Would it be a fair statement that as of this date, July 15th, 2003, DC Shoes had reached an agreement with the Internal Revenue Service over the claims asserted in the Petition For Reclassification?

A. No.

Q. What was left to agree to at this date?

A. This document, the second page, does not describe the taxes. It describes the amount of the wages. I believe that the circled numbers on the bottom right-hand side above the arrow deal with wage numbers that were used in the stip. The line above that to the right says: "Subject to lower payroll tax rates under 3509." And so I think it's safe to say that at this time the appeals person saw that there was enough substantiation for requirements under 3509 to be applied, but exactly how they were going to be applied and what the numbers were I can't say had been determined. I don't think that the stipulation numbers were finalized until quite a bit later.

Q. Did you provide a copy of Exhibit 121 to Mr. Blehm, or any of his representatives, at any time?

A. I don't recall.

(Magnuson Decl. Ex. 5 (Wilson Depo.) at 83:13-84:1; 87:21-89:13.)

For one reason or another, at trial Plaintiffs abandoned this fraud theory, neither mentioning it in their trial brief nor in their opening statement. The issue never went to the jury. Thus, what Plaintiffs are essentially arguing here, masked as "new evidence" and "surprise," is that they made a tactical decision for one reason or another not to pursue this theory at trial and now, having not had luck with alternative claims for relief, would like another bite at the apple. This, unlike surprise or new evidence, is not a valid basis for a new trial. *See, e.g., Slemons v. Paterson*, 14 Cal. 2d 612, 615 (1939) (There is "no provision for a new trial on account of mistake of law of a party or his attorney"); *In re Marriage of Liu* , 197 Cal. App. 3d at 155 ("There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from accident or surprise."). As a measure against duplicative vexatious litigation causing expense to the parties and wasted effort and expense in judicial administration, a party is precluded from relitigating issues they could have raised in a prior action concerning the same controversy. *See, e.g., Aerojet-General Corp. v. American Excess Ins. Co.*, 97 Cal. App. 4th 387, 402 (2002) ("A party cannot by negligence or design withhold issues and litigate them in consecutive actions."). Plaintiffs cannot avoid this bar here.

In his declaration, Blehm also makes much of the fact that Mr. Wilson at one point represented him in his individual capacity, in addition to DC Shoes. (Blehm Decl. ¶¶ 3-10.) He includes with his Motion, a retainer letter between himself and Mr. Wilson from October 2001 and a copy of his retention check. The point of this argument is unclear. But, to the extent Plaintiffs are suggesting that this, too, constitutes new evidence or a surprise, Plaintiffs are, again, very confused. This, like the other evidence discussed above, was neither new nor a surprise at trial. Indeed, Plaintiffs themselves retained Mr. Wilson years before they brought this action. Nor, as Plaintiffs suggest, could this so-called new evidence have supported a breach of duty claim against Mr. Wilson at trial, given that he was not a party to the action.

Because there is simply no basis for a new trial on the grounds of newly discovered evidence or surprise, this argument should be rejected out of hand.

B. The Court Properly Admitted into Evidence Plaintiffs' Amended Tax Returns.

Plaintiffs also contend that the Court improperly allowed into evidence Plaintiffs' amended tax returns, which Plaintiffs argue were irrelevant, prejudicial and contrary to the Court's ruling on Plaintiffs' motion *in limine*. (Motion at 8.) Plaintiffs contend that the admission of these documents made Blehm appear "not the victim he is, but rather as a tax-cheat and abuser, garnering little or no sympathy with the jury." (*Id.*) Again, Plaintiffs' recitation of the facts is facially inaccurate and provides no basis for a new trial.

Although they do not specifically reference the exhibit numbers of the amended tax returns at issue, it is clear that Plaintiffs are claiming that it was Blehm's personal amended tax returns for tax years 1998-2000 that were wrongly admitted into evidence. (*See* Motion at 8 ("the Court allowed evidence of Mr. Blehm's Amended Tax Returns which was overly prejudicial . . .").) Those amended returns were marked as Exhibits 40, 41 and 42 at trial. The excerpts of the transcript attached to Plaintiffs' Motion pertain to FDC's amended tax returns (Exhibits 59, 62 and 63) – an entirely different issue.

As Plaintiffs point out, Blehm's personal tax returns were the subject of a Motion *in limine* filed by Plaintiffs. Plaintiffs incorrectly represent, however, that that "based upon a Motion in Limine, it was decided that no evidence of Plaintiff's tax returns would be admitted." (Motion at 8.) In fact, the complete opposite is true. Plaintiffs' Motion *in Limine* Number 4 asked that the Court exclude from evidence Plaintiffs' tax returns for 1998-2000. (Magnuson Decl. Ex. 8.) Defendants' opposed Plaintiffs' motion. (*Id.* Ex. 9.) On October 18, 2007, at the hearing on the parties' respective *in limine* motions, the Court *denied* Plaintiffs' motion, stating:

MR. CAMPITIELLO, I'M GOING TO DENY YOUR

> MOTION IN LIMINE NUMBER 4 OF 4. I DO HOPE THAT BETWEEN THE PARTIES WE CAN ARRIVE NOT ONLY AT THE APPROPRIATE REDACTIONS, WHICH I IMAGINE UNDER THESE CIRCUMSTANCES ARE GOING TO BE EXTENSIVE, BUT ALSO AN APPROPRIATE LIMITING INSTRUCTION . . . SO I'M GOING TO DENY IT WITHOUT PREJUDICE FOR YOU TO RAISE IT AGAIN IF IT BECOMES AN ISSUE.

(*Id*. Ex. 10 (10/18/07 Trial Transcript) at 23:12-28.) The Court did grant Plaintiffs' Motion *in limine* to exclude from evidence Plaintiffs' 2003 and 2004 returns. Those, however, are not at issue in Plaintiffs' Motion.

More importantly, it was Plaintiffs that then moved these amended tax returns in their entirety into evidence. (Ex. 11 (11/7/07 Trial Transcript) at 61:24-63:8, 64:23-66:4, 66:23-67:20.) And, upon the questioning of his own counsel, Blehm proceeded to testify at length about the returns. (*Id*. at 61:24-69:15.) Thus, Plaintiffs' argument that it was an error of law to admit into evidence the amended tax returns that he himself decided to introduce into evidence is not well taken.[2]

Nor would it have been error to admit Plaintiffs' amended tax returns even if Plaintiff had not themselves introduced these documents into evidence. Plaintiffs' amended tax returns were highly relevant to a number of issues at trial, including Plaintiffs' purported damages. Absent an examination of the returns, there would have been no way of determining whether the amounts allegedly being sought by the IRS from Blehm had anything to do with, as Plaintiffs' claimed, the IRS's reclassification of Blehm as a direct employee of DC Shoes for tax years 1998, 1999 and 2000. The returns were also relevant and absolutely critical to establishing Defendants' unclean hands defense. It was only through Plaintiffs' 1998-2000 tax returns that Defendants could demonstrate that, by concocting a scheme at DC Shoes in which he was paid as an independent contractor, rather than an employee, Blehm was able to avoid paying virtually any personal income taxes. And it is only through those same returns that Defendants could demonstrate that Blehm, though aware that DC Shoes had not withheld any amounts from his income or otherwise paid such amounts to the IRS, filed amended tax returns for 1998-2000 in October 2002, claiming to the IRS that DC Shoes had in fact withheld those amounts – again, in an attempt to avoid paying personal income taxes. Thus, the admission of those tax returns into evidence was not an error of law justifying a new trial.

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[2] Though unclear, Plaintiffs also seem to be arguing that the exclusion of Exhibit 217, and the admission of Exhibits 200-202 in its place, demonstrates that the Court excluded certain evidence objected to by Defendants as overly prejudicial, but failed to do the same for Plaintiffs' amended tax returns. (Motion at 9.) As the Court is well aware, an assessment of the admissibility of evidence under Evidence Code Section 352 is a fact specific inquiry. How the Court might rule on one piece of evidence is irrelevant to how the Court should rule on another entirely different piece of evidence.

IV. CONCLUSION.

For the foregoing reasons, Defendants' respectfully request that the Court deny Plaintiffs' Motion for New Trial.

DATED: August 1, 2008

MICHAEL G. YODER
MOLLY J. MAGNUSON
DANIEL S. ROBINSON
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By: [signature]
Molly J. Magnuson
Attorneys for Defendants
DC SHOES, INC., KENNETH BLOCK, DAMON WAY, THE DAMON WAY REVOCABLE TRUST U/A DATED MAY 20, 1999 and BRIAN WRIGHT

PROOF OF PERSONAL SERVICE

I am a citizen of the United States and employed in the County of Orange, State of California, at the law firm of O'Melveny & Myers, located at 610 Newport Center Drive, CA 92660. I am not a party to this action.

On August 1, 2008 I caused the personal service of the following document(s):

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR NEW TRIAL

by requesting that an agent or employee of First Legal Support Services deliver to the office of the recipient named below, either by handing the document(s) to the recipient or by leaving the document(s) with the receptionist or other person apparently in charge of the recipient's office:

Roy R. Withers, Esq.
Law Office of Roy R. Withers
2802 Juan Street, Suite 12
San Diego, CA 92110

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 1, 2008, at Newport Beach, California.

SIGNATURE: [signature]

PRINTED NAME: Adonna Payne